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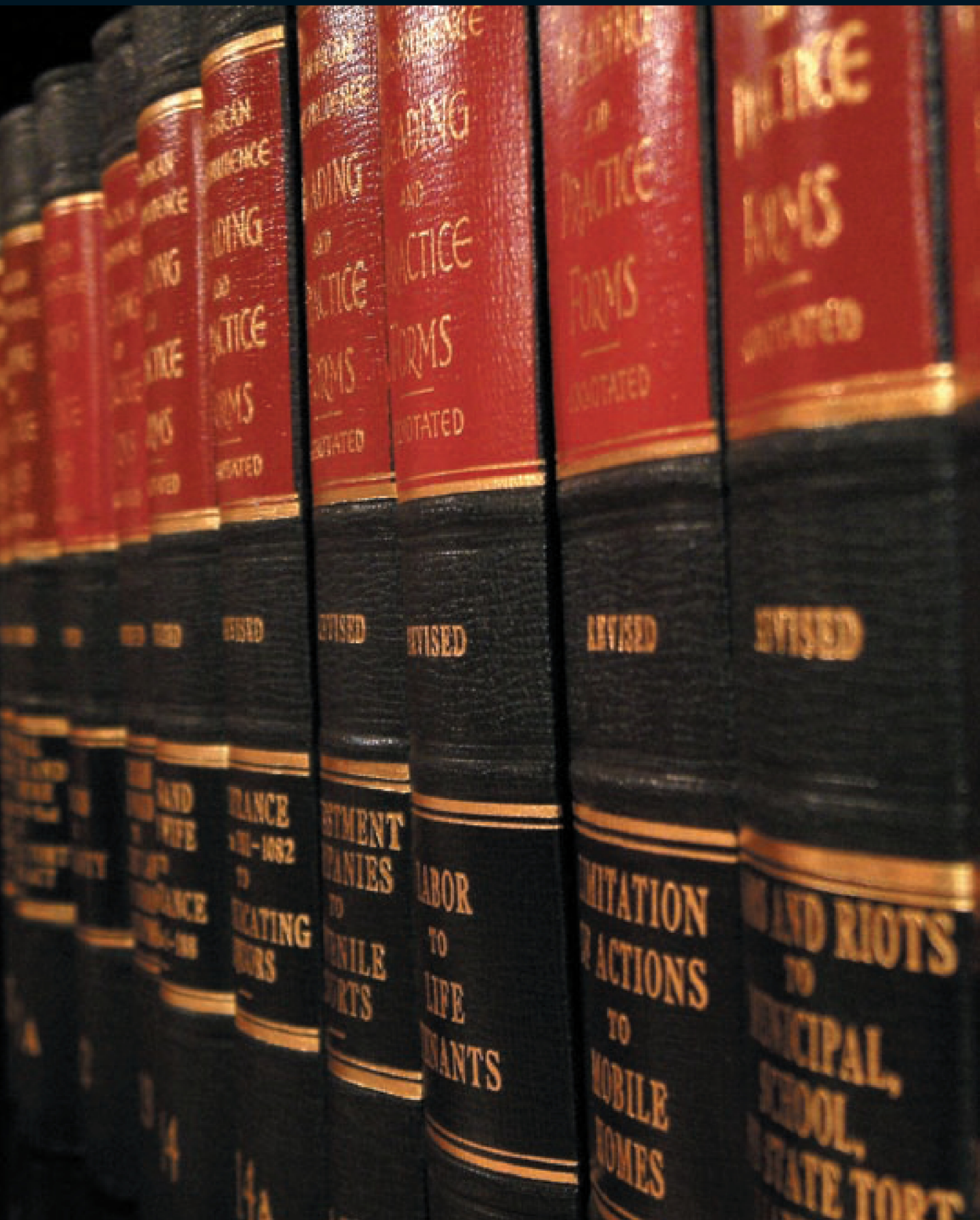

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Editors: Miklós Kengyel professor
Attila Badó professor
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István H. Szilágyi associate professor
Edina Vinnai assistant lecturer

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Mailing Address: University of Szeged,
Faculty of Law,
Institute of Comparative Law,
H-6722, Szeged, Rákóczi tér 1.,
E-mail address:
kontrolljog@yahoo.com


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Contents

■ András Kőrös

Self-determination and Protection of the Family – Two Aspects to be Reconciled in the Conception of a New Hungarian Family Law Book*

The profound economic and social changes which have taken place in Hungary since the collapse of communism in 1990, have brought such changes in the area of civil relations that their legal coherence requires the framing of a new Civil Code. The concept of the new Civil Code was prepared on the basis of a Government Resolution in 1998, titled Conception of the New Civil Code. The Conception would like to integrate the broadest possible range of private law regulations stipulated in specific laws, among others, the regulations of family law. Thus the substance of family law will be incorporated in the Civil Code as a separate Book of the Code.

Brief History of Hungarian Family Law

The comprehensive codification of Hungarian family law was accomplished for the first time in 1952 by the Family Law Act. Despite the date of its passing — this was the worst Stalinist period - the Act was a respectable piece of legislation. It must be stressed that the principle of equal rights for husband and wife in both marriage and family life in general, as well as the requirement to protect the interests of the child, were identified as fundamental principles of the Act. What is more, even the terms like "child born out of wedlock" and "fatherhood outside of marriage" were no longer included: the Act gave the same rights to such children as children born within marriage, in terms of both family law and inheritance law. (These regulations date back to 1946.)

Changes in family relations call for the updating of family law on a more or less constant basis. This task has been addressed partly by legislation and, on many issues, partly by judicial prac-

* In structure the Hungarian Code is inspired by the Dutch Civil Code in that the Hungarian Code will be broken into five Books, Family Law, the subject of my presentation, being one of them.

tice, which may often be regarded as the forerunner of legislation. Hungarian courts have adopted general rules of law that have been codified through legislative enactment. These codifications have been instituted by amendments of the Family Law Act. Since 1974 the state has provided financial assistance in cases where child support was temporarily in arrears. The autonomy of spouses was strengthened by a 1986 amendment which made it possible for the spouses to enter into contract in property issues, deviating from the statutory matrimonial property system. In 1995, the concept of joint parental custody of children was introduced for those parents who were living separately. Furthermore, in 1997, the Hungarian Parliament passed the Child Protection Act, placing administrative tasks in connection with the protection of imperilled children on new grounds.

Hungarian family law has also been influenced by the incorporation of international family law norms: e. g. in 1986 Hungary adopted the Child Abduction Treaty, and in 1991, Hungary ratified the UN Convention on the Rights of the Child. The most significant rule incorporated into Hungarian family law was the "best interests of the child" standard, which is an indispensable requirement in the course of the court proceedings and decisions concerning the child.

The Requirement of the Harmony of Family and Individual Interests

Integration of the body of family law into the Civil Code would certainly raise more questions than would be raised by adjusting the amended Family Law Act to today's circumstances. One of the most important questions is the requirement of the harmony of family and individual interests. The increasing autonomy of the members of the family must not violate the interests of the family as a unit. Self-determination and protection of the family are the two aspects on which the Conception of the new Family Law Book has been built. The Conception intends to ensure the harmony of these main principles especially in the field of the law concerning the rights of the child and in the inner relations of the spouses too. But how can the law intervene in family relations on behalf of the child or one of the spouses?

Different legal systems have different approaches to defining the extent and depth to which the regulation of family relations should be a legal function, beyond which such relations should be regarded as the "internal affair" of families and in respect to which legal intervention is likely to prove unnecessary. Similarly, different national legislations have a different view of the extent to which they want to exercise state powers and authority to resolve conflicts within legally regulated family relations. In many countries, the legal trend seems to be in the direction of restricting state intervention as much as possible, or while retaining the possibility of state intervention, give preference to alternative instruments, particularly mediation and alternative arbitration.

The Principles of the New Family Law Book

The peculiarities of the social relations regulated by family law necessitate that certain fundamental principles, characteristic of family relations but typically differing from civil law, should be formulated in the preamble to the Book on Family Law.

1. Among the principles in the preamble to the Family Law Act, it is justified to preserve the principle of protection of marriage and family, the principle of equal rights for parties both in marriage and parent-child relations, as well as the principle of the protection of children and the priority of their interests.
2. The harmony of social and individual interests prescribed for the application of law will be replaced by the requirement of harmonizing family and individual interests.
3. The ban on discrimination in relation to family law before the European Court of Human Rights — although not in Hungarian cases — has emerged particularly regarding the equal rights of children born out of wedlock. I should mention that this discrimination — at least at the legislative level — had already been abolished in Hungary in 1946 prior to the adoption of the Family Law Act.
4. Nevertheless, it is desirable to promulgate in the sphere of family law rules, certain principles of the Convention of the Rights of the Child, such as the principle that a child should, to the extent possible, be brought up in his/her natural family.

As mentioned one of the main principles is the requirement of harmony between family and individual interests. How does the Conception of our new Family Law Book intend to ensure this harmony? Where are the limits to self-determination — on behalf of the protection of the family, the protection of the "weaker party" - according to the opinion of Hungarian family law makers? I'd like to investigate this question in the main fields of family law: divorce, alimony, matrimonial property and parental custody.

Divorce

A significant majority of legal systems today already profess the principle of the breakdown of the marriage instead of the principle of fault in marriage dissolution cases. Moreover, it has become quite widespread in legal systems that they recognize divorce by mutual consent (joint agreement) as an independent option of dissolution, but with the condition that the spouses must agree also on the collateral issues or at least the majority of them, and most legal systems also stipulate separation for a defined period of time.

The rules of the Hungarian divorce law in essence follow the international tendencies: they accept the principle of the breakdown of the marriage and do not list any itemised causes for the dissolution. They identify under separate rules the dissolution on the basis of common agreement by the parties if it extends to an agreement on the main collateral issues (the placement and the support of the child, and the use of the family home). Generally speaking, they do not require any lengthy separate domicile

or just any separation for the dissolution of the marriage and fault may be meaningful in some collateral issues but may not be important unconditionally.

However, the Conception considers that the facts and rules of dissolution on the basis of agreement versus not on that basis should be more distinctly separated than it is stated in the current law. In the case of mutual consent, the court cannot investigate whether or not the marriage is in fact irretrievably broken down if the parties alleged the breakdown.

In many countries the reconciliation of the parties or the more civilized settlement of collateral issues of the dissolution proceedings is helped by a so-called mediation procedure independent of the court proceedings. Mediation is already well known in many areas of Hungarian law as a procedure that replaces court proceedings and the parliament passed a law on the conditions of this kind of activity in general in early 2003. It could play a role in divorce law if taken not as something replacing the court proceedings but as an institution assisting the court, particularly in settling collateral issues in divorce suits. An obligation to use the mediation procedure in the cases concerning the life of the child (the placement of the child, and the regulation of contact between the child and the parent living apart) perhaps would mean a step forward to the civilized separation of the parties, too.

Alimony

The importance of alimony in Hungarian circumstances is much smaller than in many other countries, but some changes in social and economic relations will most certainly lead to changes in this regard, giving it greater significance.

The Family Law Act stipulates maintenance obligation or entitlement based on law, making no mention of the possibility that the parties may arrange maintenance by spouse also by contract. In that process — which is the more frequent case in Hungarian practice — one of the parties may undertake a maintenance obligation even when no legal preconditions require it. Allow me to mention that there are two comparative legal researches in Hungary surveying the European legal systems investigate whether certain legal systems allow that one of the parties to waive his/her maintenance claims by contract. It can be questionable whether the law should stipulate the possibility of agreement on maintenance by the spouses, but it still must be said that alimony — if so required — is a collateral issue in a dissolution process under mutual consent that requires the agreement of both parties.

The general legal preconditions of maintenance by a spouse on the basis of law, namely, on the side of the beneficiary, do not require any amendment. The preconditions are that the beneficiary must be in financial need for reasons beyond that person's control, and not be a person who is ineligible for maintenance. On the side of the obligor the precondition is the capacity to provide for himself and support others who have to be supported by him.

However, it should be taken into consideration that no maintenance would be due to a spouse, even if the legal preconditions exist in the case of a marriage or common law cohabitation — particularly when there are no children — that was of short duration, say, less than a year.

Matrimonial Property

In the course of the past ten years, significant changes occurred in property relations, their importance, the magnitude of private property, and the direct or indirect participation of private individuals in economic life. However, the property-law provisions of the Family Law Act of 1952 came into being when the rapid demise of private property was the government's goal and hence they were regulated insufficiently. Legal practice soon showed that the matrimonial property law provisions, written in only five articles, were not satisfactory even in a world where private property played an ever decreasing role in economic life. First, court practice tried to fill the gaps, and later on, the legal principles developed in court practice received regulation in law, in the articles of 1974 and 1986 amending the Family Law Act. However, in 1986 there were new developments in economic relations, and the law acknowledged the possibility of entering into property contracts that had been abolished in 1952. Thus partners getting married and spouses acquired the right to determine a matrimonial property system different from the statutory community property regime. The contract was valid only if a notary or a lawyer had certified it. Still, the provisions of community property contracts were regulated too briefly and not even unambiguously. For this reason, the rules of the contract need to be worked out in more detail than in the current regulation. (The current law contains only one sentence about the substance of the contract, saying that "the spouses may decide, deviating from the provisions of this Act, which property should be joint or separate properties.")

Basically, a matrimonial property contract can have two types of content. One is to stipulate another community property-law system differing from the legislative community property-law system. The other is the acceptance of the legislative community property regime, deviating from the general rules included in the law on some issues (e. g., the objects of common or separate property, management of common property in case of business-property, the rules of handling the property or disposal over common property). Deviation in part-issues, naturally, may also occur in the area of the optional property-law system. Of course, no law can regulate in advance the possible and full content of such a contract, but it is undeniable that a regulation broader than the current one would be necessary, e. g., the provisions of optional matrimonial property-law systems need to be worked out.

What are the limits to self-determination of the parties in connection with the possible content of the contract? I am convinced that contractual liberty, on the one hand, may only go to the limit that it may not infringe upon basic family-protection interests. For example, it may not allow any avoidance of the costs of the common

lifestyle, any non-participation in the children's financial care or any unilateral disposal over the rights of spouses to live in a dwelling they occupy, and, on the other hand, the contract may not aim at any encroachment upon creditor's rights, if there are any. Moreover, the ban on infringement upon "sound morals" must be established in family law, which serves as a general rule in the Hungarian Law of Contracts, too.

The Conception of the new Code holds that a matrimonial property agreement should contain a provision also in the case of death, and to this extent the spouses may have a joint will. However, such joint will provisions in the contract should lose their legal force when the spouses have, or one of them has a child subsequently, following the agreement.

The currently valid family law provisions determine separately the issues of settlement of dwelling use by the spouses in case the settlement is based upon an agreement between them. Couples planning marriage, and spouses, can conclude a contract for the future disposal of the joint dwelling in the event of divorce. Regarding the substance of these contracts, the currently valid provisions need to be amended in certain respects.

At present a judge is entitled to deviate from the way of settlement of the use of the dwelling as written in the contract, in the interest of assuring the right to use of the dwelling for the minor child, even according to the currently valid provisions. This requirement ought not to be lifted in the future, but it would be necessary to prescribe the obligation on the part of the legal expert to inform the parties regarding this fact.

It would be necessary to recognise by law that the spouses should be entitled to enter into a contract settling the use of the dwelling by the spouses not only in the case of dissolution of the marriage but also in the case of termination of their cohabitation.

The principle of "protection of the family home" needs to establish special provisions for the disposal over the common dwelling without respect to the fact that it is common or separate property.

Cohabitation without marriage

One of the more controversial issues in the course of the discussion of the Book of Family Law planned by the Conception was the expansion of any rights that must be provided to unmarried cohabitants (so-called common law couples). Many felt that any strengthening of such rights would lead to a further weakening of the institution of marriage and family.

West-European legal systems during the last two decades almost without exception moved forward from the earlier standpoint of "neutrality" which treated the common-law couples as being "outside of the law", to a positive regulation that, generally speaking, provides a certain degree of social security, and in private law, entitlements

to maintenance and the use of dwellings and property. Obviously, in this development the massive growth of cohabitation without marriage played a role. In Hungarian law, a number of legal provisions which invest common-law couples with rights similar to those of married couples is also growing (such as pension for the widow, or the widower, and preferential rates in acquisition of dwellings).

The current Civil Code of the Hungarian Republic regulates the property law aspects of common-law relationships in the Law of Covenants. By now, this solution no longer satisfies the characteristics of such relationships. The common-law relationship calls first of all for regulation by the criteria of family law. This is why the Conception takes the position that private law provisions of a common-law relationship should be regulated in the new Civil Code not in the sphere of the Law of Covenant or Things but rather in the Book of Family Law. The current provisions — limited exclusively to joint acquisition of property — should be extended in case of a lengthy common-law relationship to include rights of maintenance and use of common dwellings. The Conception does not suggest the introduction of a registered partnership, neither for partners of the same gender nor for couples of different gender. The above mentioned expansion of the rights of unmarried cohabitants should include them without calling for registration. Naturally, a possibility would be open for the cohabitants to regulate their relationship in advance and in any way differing from the law. The cohabitees could not be excluded even from the possibility of making in a public document any statement recognizing each other as common-law couples or of asking the notary to give them a “certificate” about this relationship.

Parental custody

In the regulation of parent-child relationship, the Conception intends to consistently enforce the family law requirements formulated in the United Nations Convention on the Rights of the Child. The Conception intends to expand the rights of the offspring vis-Ð-vis the parents, and in the same way to protect the child’s contact with the parent living apart. With regard to the European Convention on Human Rights, the Concept wishes to restrict the sphere of legislative or official intervention related to the exercise of parental rights.

The possibility of exercising the rights and duties towards the children on the part of the parent living separately after the divorce or after the termination of cohabitation, requires on the part of both parents certain fair cooperation. Joint parental custody represents such a higher degree of cooperation for which no compulsion is required, and this can only be assured when parents are ready and willing to exercise this cooperation in the interest of the child. With reference to the requirement of parental cooperation in order that this right might be exercised, joint custody may be adjudicated only upon parental consensus.

The institution of joint parental custody was introduced following foreign examples and by observing the principles and rules of the Convention on the Rights of the Child by provisions of the Amendment of the Family Law Act in 1995. The provisions that

assure this issue in divorce proceedings or the child's placement take appropriately into consideration the interest of the child and the willingness of the parents to cooperate.

In contrast with the provisions in certain European legal systems, joint parental custody after the divorce or termination of cohabitation is rather an exceptional solution today in Hungary. The law ought to express resolutely that decisions in favor of joint parental custody may not mean any "divided placement" of the children between the two parents, for example, changing every week, fortnight, or month.

As mentioned, joint custody needs a higher degree of cooperation, and it could work only on the basis of the parents' agreement. A lower degree of cooperation, particularly the assurance of contact between the child and the parent living apart, is, however, not a question of undertaking, but a legal duty. Even broader cooperation is prescribed by the provisions of the Family Act, which assure a right for parents living separately to decide together the important issues concerning the life of the child and which are listed in the Act in an itemised way. (These important issues are deciding the child's name, residence and schooling).

Conclusions

Assigning the limits to self-determination in the field of family law is not an easy task. The prescriptions of the law and the actions of courts and other authorities are considered by some family members as a matter of the state poking its nose into their private affairs. But the state must not abandon cardinal principles such as the protection of the child and protection of the weaker party in general.

The Conception of the new Family Law Book regards the preservation of well-balanced family life as one of the most important human values which recognises the freedom and autonomy of the parties in making decisions on questions concerning their persons, but stresses that they have to make their decisions always with regard to the interests of the family.

However, it has to be acknowledged that ensuring the harmony of self-determination and protection of the family may not be only a legal issue: it is influenced by the moral standards of society and by public opinion.

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fjords, and islands; an important producer of copper, iron ore, nitrates, etc. Language: Spanish. Religion: Roman Catholic. Currency: peso. Capital: Santiago. Pop.: 12 683 000 (1988 est.). Area: 756 945 sq. km (292 256 sq. miles). —**'Chilean** *adj., n.*

Chile pine *n.* another name for the **monkey puzzle.**

Chile saltpetre *or* **nitre** *n.* a naturally occurring fo

chill *n.* **1.** a group of one th **2.** one

[C16: from Gk from thousand]

2. a sensation of **a cold or damp** environment, or reaction. **3.** a feverish cold. **4.** a siasm or joy. – *adj.* **5.** another word for to make or become cold. **7.** (*tr.*) to cool or drinks, etc.). **8.** (*tr.*) **a.** to depress (enthusi-). **b.** to discourage. – See also **chill out.** [OE *ciele*] —**chilling** *adj.* —**'chillingly** *adv.* —**'chillness** *n.*

chiller ('tʃɪlə) *n.* **1.** short for **spine-chiller. 2.** *N.Z.* a refrigerated storage area for meat.

chilli *or* **chili** ('tʃɪlɪ) *n., pl.* **chillies** *or* **chilies.** the small red hot-tasting pod of a type of capsicum used for flavouring sauces, etc. [C17: from Sp., from Nahuatl *chilli*]

chilli con carne ('tʃɪlɪ kɒn 'kɑːnɪ) *n.* a highly seasoned Mexican dish of meat, onions, beans, and chilli powder. [from Sp.: chilli with meat]

chilli dog *n. U.S.* a frankfurter garnished with chilli con carne served in a roll

■ Agnes Schreiner

It takes pluck

In the case of R v Walker in 1994, Brian Martin, the Chief Justice of the Supreme Court of the Northern Territory (NT) ordered Wilson Jagamara Walker's suspended sentence with a good behaviour bond. The Chief Justice assumed that Walker, who had confessed to having stabbed another Aboriginal to death in a fight that had got out of hand, would receive the punishment he deserved among the Aborigines. The defence had succeeded in persuading the judge that Walker would have to submit to a spear combat according to Aborigine law. Walker would be struck in the leg by a member of the family of the deceased, the Fry family; once this happened the case would be closed.

The ruling according Anglo-Australian law

At first sight, the Chief Justice would appear to have been acknowledging the limits of his jurisdiction and to have abandoned the case accordingly. In fact however he did not abdicate his jurisdiction. On the contrary, from the position of Anglo-Australian law he was simply confirming a principle of criminal justice — that of *ne bis in idem,* that forbids anyone from being punished twice for the same offence. This principle was the kernel of his ruling. This verdict meant that the Aboriginal response to assault, offences against life and culpable homicide has come to be treated on an equal footing with Anglo-Australian sanctions. The Walker case is therefore seen as a milestone in the recognition of the Aborigine law

of punishment.[1] But the reversal implied in the recognition of the Aborigine legal system really occurred two years earlier. The High Court of Australia had already acknowledged the existence of Aborigine rights and claims in the now famous *Mabo* case about land rights.[2] The judge in the Walker case must have figured that if Aboriginal rights concerning land were recognized, Aboriginal criminal law would have to do the same.[3] The court instructed Blair McFarland, the Senior Parole Officer to produce a report on whether Walker had genuinely undergone his punishment. If no 'payback' - a pidgin term - had taken place within six months, the court would review its decision.

On the Australian side the discussion remains as to how far the application of Aboriginal criminal law is in breach of the International Torture Convention or whether, quite simply, the imposition of the punishment does not itself amount to a punishable offence that the local police should take measures to deal with. After all a country like Australia 'cannot allow Aborigines going around spearing each other...' or 'people being stabbed ', as the *Minister of Correctional Services* (NT) Eric Poole put it on camera.[4] After all, he declared,' The usual police tactics is that of the proverbial ostrich with its head in the sand. 'Police - that is, my - policy is: we will not intervene', the sergeant in question told the reporter. Not only, as he himself admitted, was his knowledge of ' tribal laws' insufficient for him to intervene - were he to do so he would be risking life and limb...[5]

The ruling according Aboriginal law

On the Aborigine side astonishment was the prevailing response. Walker had been remanded in custody for nine months before being sentenced by the Australian court. Instead of implementing the sentence, the court decided that the punishment they

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1 The case even made the front page of a Dutch national daily. *Cf.* Esther Bootsma, Aboriginals mogen steken en slaan, *Trouw,* 2 September, 1994. As in previous cases such as that of *Jadurin v R* (1982), the defence appealed to the judge to makes use of his discretionary powers in deciding on a sentence, with the argument that the Aboriginal could also expect a punishment from his own people. But the Australian judges had in each case refused to sanction the Aboriginal form of 'retribution'. *Cf.* Diana Bell, Exercising discretion: sentencing and customary law in the Northern Territory, in: Bradford W. Morse & Gordon R. Woodman (eds.) *Indigenous Law and the State,* Foris Publications, Dordrecht 1988, p. 376.

2 About the *Mabo* case and the *Native Title Act (Cth)* of 1993 in which the verdict was converted into legislation, see Agnes Schreiner, De film 'Two Laws' in een twilight zone, *Recht der Werkelijkheid,* vol.18 (1997), no. 2, p. 112 ff.

3 Another reason for trying to find an alternative for a punishment based on Anglo-Australian law is the relatively high figures for suicide among Aboriginal detainees.

4 In *Payback,* a TV documentary by Liz Jackson, produced by Ray Moynihan, broadcast in Australia as part of the ABC series *4corners* op 12 September, 1994.

5 The same strategy was adopted in the episodes of rough justice in Staphorst in Holland. The police or local constables either did not intervene or were prevented from doing so. This was until the press started raising the issue and in 1961 the mayor gave the order for firmer measures. *Cf.* G.C.J.J. van den Bergh, *Staphorst en zijn gerichten,* Boom, Meppel/Amsterdam 1980, p. 151 resp. p. 169.

deemed necessary could be implemented by the Aborigines. 'Why didn't they listen to us?' asked Kevin Fry, the brother of the deceased. Asked for his reaction, John Tippett, Walker's defence counsel declared that 'our legal system does not encourage to have such contact with the family of the victim'. The Fry family made it known that they had decided that Walker should be tried according to 'whitefella' law and that they had stated as much in the presence of the judge.[6] 'He must do time in prison', was their conclusion.

Seen this way, the Aborigines held the initiative in this case. The decision to apply Anglo-Australian law was theirs. One can rightly state that in the Walker case, the Aborigines had accepted the official Australian law as an alternative, with its resulting Australian form of punishment.

Were the case to be referred back to them, they would have had to initiate the Aboriginal procedure, including the possibility of a spear combat. The question of if - and if so, how, when and where - action should be undertaken, is determined per case and is the subject of a face-to-face public debate between the parties involved. Walker's nine months absence in custody had made a proper implementation of the Aboriginal procedure impossible. In the TV documentary the Aborigines interviewed stressed that it had been 'left too long', that it was 'no right time' and was 'not appropriate'.[7] 'It's too late now', concluded 'mother' Fry, the aunt of the deceased.

The implementation of the penalty

In the view of Anglo-Australian law, the spear fight can be treated separately from Aborigine procedure. It regards spearing as an autonomous punishment that can be incorporated as an alternative punishment in the series of judicial penalties and measures available to judges. After the different stages of the trial have been proceeded with and the punishable offence has been ascertained, the verdict of 'guilty' follows together with a form of punishment decided on by the judge. So far there is no difference between the modern judicial systems in countries in Europe and America. There is a linear sequence of separate moments - the initial enquiry, the ascertaining of the facts, of whether the norm has been broken, the verdict of 'guilty' and the decision on the form of punishment (obviously in accordance with the legal description of the offence). Then comes the concluding moment, namely that of the punishment. There is a clear difference here with Aboriginal law, because spearing cannot be isolated as a one-dimensional form of execution of a penalty, resulting in

[6] *Cf.* Eric Venbrux, *A death in the Tiwi Islands,* Cambridge University Press, Cambridge/New York/Melbourne 1995, p. 84, where the Tiwi Aborigines also discuss whether a case belongs to their competence or to the *whitefella law.* In many instances the Aborigines are prepared to leave cases to the dominant Australian legal system. The rationale for this undoubtedly lies in their experience of the colonial masters who treat murder and manslaughter trials as belonging to their jurisdiction and are prepared to resort to the strong arm of the law to ensure that they stay there.

[7] *Cf.* note 4.

the closing of the case.[8] Spearing with the Aborigines is at any rate not carried out according to the scenario of an execution, with the guilty party standing in some enclosed courtyard faced with an alternative form of firing squad.

The old film images that accompany the TV documentary, Payback, show a duel in which both parties, equipped with wooden spear throwers and spears, strike each other in turn in the presence of a large group of people who are sitting or standing. One party makes a thrust, then waits, strikes again and parries immediately afterwards; his actions are constantly mirrored by the other. They do not aim at the head or torso - only at the legs. It requires a certain technique and skill, and even gracefulness. The audience watches intently. As the spear fight continues, either party can be wounded, and the result is anything but certain. It is more appropriate to talk of a judicial duel than of the implementation of a punishment.[9] During the duel, a judgement is carried out in the Aboriginal manner, a ritual form of judgement, such as has also been granted a place in European legal history alongside oracles and trials by ordeal.[10] The spear fight is therefore not a substitute for the punishment; rather it replaces the actual court hearing or trial.[11] If he had been serious about respecting Aboriginal law, the Chief Justice would have had to declare himself unauthorized to try the offence the party was charged with.

The rules of the duel

By contrast with 'fooling' round' or 'fightin' dirty' - namely, a spontaneous fight usually provoked by jealousy, an insult or other supposed injustice as background cause, with, still more often, drunkenness or the 'heat of the moment', in the foreground - a fight according to Aboriginal law is called a 'good fight'.[12] A dirty fight can be the immediate pretext for a 'good fight' even if the latter does not immediately follow on from the former. The former sort of fight is a banal event that can happen in the same way as so many chance occurrences. But it does of course have consequences. The initial skirmish is - if possible - broken up to invite the contending parties to take each other on at another moment in a 'good fight'. Aborigines make use of the occasion to

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[8] The same goes for penalties such as 'pointing', involving a voodoo-like stabbing with a bone, or 'singing to death', which is a sort of exorcism, to mention only the most remarkable forms of Aboriginal sentences.

[9] And one should at any rate avoid any terminology that might suggest that what is involved is a form of taking the law into one's own hands or a rabid attempt at getting revenge, as Poole's description - 'going around spearing each other' - would seem to imply.

[10] If the judicial duel is allocated a position next to the oracle and the ordeal it can then be regarded as belonging to the European past, something that modern law would certainly welcome. But the question remains of whether judicial duels can also be treated as a thing of the past. It might allow one to see the fight between soccer supporters at Beverwijk in 1997 in a different light.

[11] *Cf.* Johan Huizinga, *Homo ludens, A study of the play element in culture.* Beacon Books, New York, 1986.

[12] Gaynor Macdonald, A Wiradjuri fight story, in: Ian Keen (ed.), *Being black: Aboriginal cultures in 'settled' Australia,* Aboriginal Studies Press, Canberra 1988, p. 181. *Cf.* also Bell, *op. cit.*, p. 377, where the fight, that incidentally is also one between women, is called 'fair'.

organize the fight as a ritual. Rituals lend themselves perfectly to obtaining control over whatever it is that happens to human beings. Whether it is a disaster or bad weather, a change of season, a birth, a piece of good fortune, a knifing incident or a death - ritual makes sure that the pretext or banal event does not have its normal consequences and that in its stead a new well-organized situation is created. Of course the situation is a purely artificial one, supervised by masters of ceremony, whose role varies from boss to village elder or referee. The moment that the ritual event commences the everyday world and normal motives are suspended. 'The motives for wanting to fight the night before may be very different from those constructed by the time morning comes and the circumstances and the audience have changed' - that is Macdonald's comment on an official duel that took place on the morning after an initial conflict.[13]

The judicial duel then has its own beginning at an agreed time. It has someone who stands above the contending parties and ensures that the prescribed rules of the fight are obeyed. The place too where the fight takes place is also not a coincidence. Macdonald jotted down a detail of a story about a duel among the Wiradjuri or Koori Aborigines of New South Wales (NSW): 'There used to be gates right up there in the corner, there used to be gates - are they still there? Yes... up at the gates, at the gates, that's where they had the fightin' ring - and underneath the railway bridge.'[14] It is a fixed place that both friend and enemy make their way to before the hour decided on; they assemble on opposite sides according to the party they support. This arrangement is regulated by the person who acts as referee - his position is also proven on the spot by means of a test or challenge.[15] During the combat, the public is not permitted to interfere with the fight - they may not even urge on or encourage their own side or shout catcalls or insult the other side.[16] In such events, which as Bell says are 'very carefully stage-managed', it is clear that the character of the fight and the weapons to be used are also determined in advance.[17]

Bearing these rules in mind, a duel has a course of its own and - this was the reason for explaining the rules - its own result too.. The duel is considered finished when one of the parties falls down or is struck. The wound with which the fight ends may result in death, but the rule is to 'hit to wound', not to 'hit to kill', as the Australian judge in the case of *R v Herbert et al* realized.[18]

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[13] *Cf.* Macdonald, *op. cit.*, p. 182.

[14] Macdonald, *id.*, p. 179. On p. 181 she tells us that the spot involved is a lighted vacant site used as a carpark, outside the gates of a mission post.

[15] His authority does not apply in advance; it depends on whether his intervention is appreciated and his instructions will be followed. The same goes for the next person to come forward in the absence of a response. *Cf.* Macdonald, *id.*, p. 184.

[16] Macdonald, *id.*, p. 184. On p.186 she describes how the referee intervenes and calls for order when an onlooker begins to urge her party on.

[17] *Cf.* Bell, *op. cit.*, p. 377, in cases of a fight where a traditional fighting stick is the weapon used. *Cf.* Bell, *id.*, p. 377 and p. 378. In the duel described by Macdonald, the agreement is that the contendants may only fight with their fists. *Cf.* Macdonald, *op. cit.*, p. 195. For 'fighting with the tongue', see the article by Marcia Langton, Medicine Square, in: Ian Keen (ed.), *Being black: Aboriginal cultures in 'settled' Australia,* Aboriginal Studies Press, Canberra 1988, pp. 201-225.

[18] Quoted by Bell, *op. cit.*, p. 378.

The duel sanctions

In a physical sense there may be a winner and a loser, but the true victory of the Aborigines does not lie in the result but in the beginning of the fight and in the course it takes, in the fact that it is entered on and that both parties put up a good show. 'Someone who does not make a good show for themselves - is half-hearted or starts to fight dirty - will not win support. Someone may put up a good fight against an opponent recognised as being stronger and more skilful. Although technically the loser, they will still be admired for their pluck.'[19] 'Pluck', or courage, is what it is all about. The pluck to come up for the deed one has perpetrated.[20] Furthermore, the act itself testified to the necessary courage - the courage, that is, to break a taboo. Not to mention that of the people who come up for the taboo that's been broken - that takes some courage too!

No matter how often the opposite is claimed, breaking a taboo should not be regarded as the transgression of a norm - at least not if we base ourselves on the original meaning of the word 'taboo'. The fact that something is taboo doesn't mean that it is forbidden, but that it is provided with a identifying mark.[21] Taboo therefore means a sign or a mark. Something that attracts attention and that is open to being read. Something one takes notice of, and that one cannot simply overlook. One can pass it by on condition that one respects the mark and is prepared to take the consequences. What the consequences are depends entirely on the departure point or the intention with which the taboo is broken. In most cases it works out alright and everything goes as it should.[22] But sometimes more is at stake: one has broken the taboo and is on the other side; one has come to stand as it were *behind* the taboo. The consequence is that the taboo breaker has himself become taboo, thus acquiring for himself the qualities that were tabooed and which were taboo for him. These qualities include exceptional talents or powers, often dedicated to ancestors of guardian spirits ('genii'). It cannot be said that these taboo qualities are bad in principle.[23] They are summed up under the term 'mana'.[24] If the person in question is positively tabooed,

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[19] Macdonald, *op. cit.*, p. 189.

[20] In her enquiry into the social value that fighting has for the Aborigines, Macdonald concludes - mistakenly in my view - that pluck is a right: 'the right of individuals to stand up for themselves and to brook no interference from others' (Macdonald, *id.*, p. 188).

[21] *Oosthoeks Encyclopedie,* Utrecht 1968, 6th edition: 'Polynesian adjective *tapoe,* meaning provided with an identifying mark, used for places and objects where something exceptional is involved, but not necessarily anything to do with religion.'

[22] A small ritual is sufficient to show respect, One lowers one's eyes or makes a detour (for instance if one has to walk past one's mother-in-law or sister), or one bows or says a greeting (for instance, if one meets an elder), one offers some food on a leaf or the first draft of a bottle as a sacrifice (on passing the spot where one's ancestors are buried). Seen in this light, the ritual is also a sign included in a series that goes from sign to sign, instead of a behavioural norm issuing from a system of norms, in which one norm weighs more than another.

[23] It can go either way, similar to Machiavelli's concept of 'virtù' (*Il Principe,* 1532), that derives from the Latin word 'virtus' and which can also be translated as 'courage'.

[24] *Cf.* as in note 21, *Oosthoeks Encyclopedie.*

'mana' may mean fame, honor, prestige, success, sex appeal and privilege - things that as everyone knows are not reserved for everyone. To figure out whether 'mana' is auspicious or not it has to be weighed in the scales, on the principle of who dares wins. It is this set of scales that, in keeping with Huizinga's line of thought, is effectively the Scales for the Aborigines.[25]

It is too simple to assume that what is involved in the combat is a split between the two conflicting parties with one side defending the taboo and the other breaking it. Is it that one warrior fights for the norm and thus for peace and quiet and a certain way of dealing with the established signs and taboos? Does he take a stand against the other warrior who has had the effrontery to transgress the form, because he wants to claim more 'mana' for himself? But neither of the spear fighters lack courage ('mana'): the pluck to challenge and the pluck to accept the challenge. They are recognized by the bystanders as challenger and challenged (taboo) and will engage in the fight ('mana') in an enclosed space (taboo). In compliance with the rules (taboo), one blow will follow on another. Pluck is involved, as said already; but dexterity, cunning, concentration, aggression, skill and strength (all of them 'mana') are also at stake. Every blow that is delivered, no matter whether by challenger or challenged, evokes a moment of 'mana' upon which a moment of taboo follows immediately and unmediated, after which another moment of 'mana' dawns and so on. There is no serious possibility of 'mana' and taboo being installed as a permanent moment, let alone that a prohibition or a norm could be instituted. Only the moment of 'that's enough now' or 'no more then' will have that opportunity.[26]

In the Aboriginal duel too, no fixed role is attributed to the perpetrator and the challenger, who, according to Anglo-Australian law, takes up the cause of the victim or injured party. The perpetrator becomes a victim as soon as the other party deals him a blow; the other party who represents the victim at once becomes a perpetrator, who again becomes a victim if he suffers the consequences of a counter-attack... Perpetrator becomes victim, victim becomes perpetrator.

This secret reversal, that actually lies hidden in every conflict or confrontation is elevated to the status of a principle in the judicial duel. It should be clear by now no specific moment can be identified in a duel like this in which a punishment is meted out or where a sanction is imposed. In fact the duel sanctions this lack of sanctions.[27]

Nor does the conclusion of the duel offer any sanction, prohibition or norm, because the end is only a consequence of the course of the duel. Between one 'strike' and reception and the following one, the most appropriate strike is decided on and with it an end comes to this permanent interchange just for a moment. At most, the end instigates a new rite, namely that of 'shaking hands' or 'calling it quits'. 'They had

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[25] Huizinga, *op. cit.* p.79

[26] Macdonald, *op. cit.*, p. 187. 'The spectators (...) stop the fights if one of the antagonists says they had enough (*id.*, p. 188).'

[27] For our ancestors who spoke Latin, 'sanctioning' meant in the first place making something sacred, and derives from the word 'sacer'; it thus implied the notion of consecration, a ritual practice, that is. In the first contribution to the *Rode draad* series on 'Sanctions', Henket speaks in this connection of 'positive sanctions', that he then leaves aside because he wants to limit his definition of sanctions to negative ones. *Cf.* M. Henket, Sancties, *Ars Aequi,* 46 (1997), p. 8, note 13.

to shake hands and told them to make friends... and they sorta made friends' - this is how the story of the Wiradjuri duel comes to an end.[28]

'The Kooris are socialized into consistency rather than conformity.'[29]

In the Aborigine approach by which a ritual platform is furnished for the two sides that a conflict or altercation usually consists of, we see Aboriginal law in action, their mode of trial or what in legal anthropology is called their 'disputing process'. The ritual order that is created by them provides a space for no matter which two poles, extremes, or parties that present themselves. Even the poles of Good and Evil are offered a ritual space. The Aborigines are consistent in ritualizing every difference. In this respect, they refuse to make any distinction between one or the other of the two poles. Western and non-Western are therefore both able to appear on the ritual platform. Thus it is possible to see what the Aboriginal approach will be in a situation where the duel is held in a Western context.[30] The chance that policemen will be present at an Aboriginal duel is great. If they take the initiative of intervening, this intervention is seen from the viewpoint of the Aboriginal duel as another 'wager' placed within the fight. 'The usual order of events in Aboriginal is then disrupted after repeated interventions, causing conflict between Aborigines and non-Aborigines which tend to be ritualized.'[31] The policemen may expect a ritual slanging-match and an invitation to engage in a 'fair fight'. But the policemen will undoubtedly respond by making a series of arrests. The Aborigines will be charged with 'unlawful assembly, assaulting police, resisting arrest, hindering police in the execution of their duty, causing damages to police vehicles, assaulting civilians, damaging civilians' vehicles, and damage to property'.[32] It is hardly surprising then that statistics show that very many Aborigines have been locked up in prisons and other detention centers.

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[28] Macdonald, *op. cit.*, p. 190.

[29] Macdonald, *id.*, p. 191.

[30] *Cf.* Langton, *op. cit.*, p. 201. She focuses on the situation in New South Wales. The title of her article refers to a ritual space in Western Australia, that the Aborigines call Medicine Square after Madison Square Gardens. *Cf. id.*, p. 222.

[31] Langton, *op. cit.*, p. 212.

[32] Langton, *id.*, p. 213.

■ **Lilla Farkas – Gábor Kézdi – Sándor Loss – Zsolt Zádori:**

Today's practice of the police in racial profiling

(Original article issued in Belügyi Szemle, 2004/2-3.)

Summary

Taking a short visit in jails of different countries and realising the huge number of ethnic minority prisoners may lead us to a conclusion that ethnic minority has a much higher criminal record than ethnic majority. In Hungary, where discrimination can be well observed in general, the problem is very similar in almost every field of life except the very place of jails where Gypsies dominant.

There is a very serious debate all over the World about what should be done against this undesirable situation. In Hungary, since the change of regime, every important public matter is available to study without any restraints but researchers and decision-makers still could not find the answer for the above-mentioned question.

This essay examines only one certain point of the discrimination as it was studied by the MHB between 2001-2003. The concrete subject of this research was - maybe not surprisingly - the practice of racial profiling of the police. Despite the restricting rules of personal data protection and court attitude, we processed a great number of files and based on these samples we explored some remarkable pieces of inherence.

Analysing the relevant special literature it became clear that there was no such a phenomenon as Gypsy-crime: this phrase was developed in the interest of the possibility of controlling the ethnic minority by greater police forces. This theory is verified by the observation which proved that different instruments were used in criminal investigations depending on whether the suspected is a Gypsy or a non-Gypsy.

When it is proved that a measure (a commanding order for example) causes disadvantages for Gypsies contrary to

non-Gypsies the current law speaks about direct discrimination. When the applied measure is seemingly not discriminative on paper but it is in practice - like in several cases - we speak about indirect discrimination.

Background

As it was already pointed out, in Hungarian jails Gypsies are the dominant ethnic. Up to the present we have got only two different and at the same time extremely prejudicial explanations for this dominance: the first one claims Gypsies tend to commit crimes in higher proportion than non-Gypsies in consequence of sociological-cultural and financial reasons. The other theory states that all the people who have any role in the criminal investigation process (policemen, prosecutors, judges, even plaintiffs and witnesses) are racist.

Since none of the above mentioned theories helped us to find out the true reasons of the existing discrimination the MHB developed a mainly sociological and statistical based research system which was preceded by a test-research to sort out possible methodical problems. This way we established an unprecedented and unique process that enabled us to examine reliably and objectively the question of "Gypsy-crime".

The phenomenon of discrimination

We defined discrimination as an intended or unintended act (legal consequences, treatment, etc.) that affects Gypsies much disadvantageously than non-Gypsies. It was also considered as discrimination when ethnic difference was just one of the several different reasons which led to discrimination in case if this reason was the most essential one.

The phenomenon of Gypsy-Roma

We referred the suspect as a Gypsy in all cases when anybody involving in the criminal investigation process took any kind of comment which suggested that the accused was a Gypsy.

Researching method

Establishing our researching method we had to pay attentions to the strict personal data protection in one hand and the difficulties of suspects ethnic determination on the other. In conclusion, we adopt a method that was elaborated for one of the British government's projects (Commission for Racial Equality) by Roger Hood, titled Race and Sentencing (published in 1992).

The data base for the statistical working up was produced by analysing court files. However this procedure did not make us enable to examine the entire spectrum of discrimination against Gypsies in criminal investigation processes, since some groups of criminal investigation acts (identity check, arrests for example) were not provided according to ethnic.

Possibility of research in court files

Sociology of law cannot exist, absorbed sociologic and scientific evaluation of the work of the courts cannot be realized if scientists cannot get access to court archives. If research is limited to general (national) archives, scientific analysis would lose its relevancy and be ousted from the world of living law.

It was clear that there were no special norms on research within court archives, nevertheless the confusion we made among actors of jurisdiction with our request was surprising. Though in the last few years several important jurisprudential works were made based on researches in court records — like the one by Krisztina Morvai on the delicate matter of violence inside the family or the paper on indemnification by Legal Defence Bureau for National and Ethnic Minorities —, meanwhile we were informed that colleagues from state research institutes and faculties of law faced similar difficulties when requesting the right to inspect court files. Till the end of our work courts of some counties had worked out a common practice that it was prohibited to make scientific researches in court archives. According to our experience, these counties are Borsod-Abaúj-Zemplén, Szabolcs-Szatmár-Bereg, and the courts of the capital, Budapest.

Sampling

The targets of the observation were all definitively finished cases of theft, petty theft and robbery with full documentation, which had started in 1999 (at smaller local courts cases started in 1998 or 2000 as well). The single unit of the observation was the principal defendant of these cases. All details were from court files.

Algorithm used in this survey was a two-step, layered sampling. First of all we selected courts, then files. The aimed amount of units was a number of 1000-1100 files from 15-20 courts. Finally we worked out altogether 1147 files from 18 courts. In the course of sampling we made efforts to let the sample reflect on reality in terms of regional differences, therefore we chose courts from regions either of a high, an average or a weak density of gipsy population. Eighteen courts out of thirty-seven authorized the survey. The territorial competence of these courts serve as a residence for about 18 per cent of all the gipsy population of Hungary.

Permission for the research was in close connection with the number of gipsies living in that region: the proportion of gipsy people was 11.3 per cent on the territorial

competence of courts that did not authorize surveying their files or did not answer on our request, the same rate was not more than 4.5 per cent on the territorial competence of courts that had authorized our work. In counties Borsod-Abaúj-Zemplén and Szabolcs-Szatmár-Bereg only one court out of ten requested authorized the survey. 26 per cent of courts denied the authorization in regions where the density of gipsy people is less then 6 per cent, whereas the rate of denial was 78 per cent in regions where the density is more then 6 per cent.

It resulted a malformed sampling: territories densely populated by roma people are malrepresented. Sad to say: we did not have the chance to amend this situation. If the treatment received by gipsies in these regions is different in investigation and judicature, than it deformed our results as well. We have every reason to suppose that the reason for denials is remorse or fear. Results of preceding researches show that there's a stronger hostile attitude against gipsies in these regions among authorities. If it's the same with us — and it has a chance —, it results that practice explored in this research shows a more favourable picture on equality before the law than reality.

We used the details on structure of criminality of gipsies when choosing the observed types of delicts. According to details by László Pomogyi, in the first half of the twentieth century the rate of gipsy committers was higher than their frequency in the whole population only in case of delicts against property. A higher amount of gipsies were sentenced because of theft, robbery, receiving stolen goods and fraud. These conclusions tally with statements by Emil Molnár in his 1926 work on the criminality of gipsies: *"their delinquency culminated in delicts against property."*

When preparing for this research we decided to examine the files of two types of crimes. The reason for choosing theft was the big number of cases, and, on the other hand, we supposed that we'll find less instance documenting a very special treatment where officials are "used to" the presence of gipsy committers. The reason for choosing robbery was the seriousness and the character (using violence), the degree of the expected penalty and the probable remand, and the opinion of those who know this topic well that the "overpresentation" of gipsies can be best observed among robbers.

In our final model we worked out altogether 1147 cases. Procedure against 216 juvenile and 931 adult offenders was involved into the research.

Racial/ethnical profiling as a factor of discrimination

In this paper we inform about the results concerning the part of the police of our research on criminal procedure. We examined, how accused people got into the scope of the authorities. We found a sharp deviation when examining *flagrante delicto* on one hand, and identity check (including traffic control) on the other hand. We took details on other types of police measures as well (e.g. identification by witnesses, social contacts, warrant), but these did not show a sharp difference in gipsy-non-gipsy relation.

Details and conclusions below harmonize with results of Anglo-Saxon researches examining discrimination against "visible minorities" in the criminal procedure. In the draft we noted that because of the borders of this method and the lack of ethnical breakdown of details on identity check and arrestment we cannot expect the plastic representation of racial profiling. In spite of our reservations **it seems to be unequivocal that practice of racial profiling is highly accepted in Hungary and appears as an important component of discrimination against gipsy people in the criminal jurisdiction.**

Table 1.
How the accused got into the scope of the authorities (juvenile and adult together)

Getting into the scope	Non-gipsies	Gipsies	Aggregate
Unknown committers	48,05	55,06	49,98
Concrete person	17,72	12,53	16,29
More than one known persons	1,47	2,82	1,84
Known and unknown	0,89	2,11	1,23
Person named by the informer	8,95	13,88	10,31
Flagrante delicto	22,91	13,59	20,34
Aggregate	100,00	100,00	100,00

According to the global details every second committer was unknown to the authorities when starting the procedure. It's seven per cent more frequent that a committer considered to be gipsy later was unknown. Every fifth offender was caught in the act but there is a sharp deviation between gipsies and non-gipsies. 23 per cent of non-gipsy committers was caught like that, while among gipsies this rate is only 13 per cent.

The difference resulted by *flagrante delicto* is equalized later, when gipsy committer are identified with the help of the denunciator's observation or any other way.

The level of deviation is even higher in our model if we compare the group of gipsy (252) and non-gipsy (568) accusees, and observe that in case of gipsies (where there are details on the ethnical profile in the files) 57 per cent of defendants was unknown when starting the procedure, while in case of non-gipsies this rate is 47 per cent. We can recognize a still more spectacular difference in *flagrante delicto.* 21 per cent of gipsies and 38 per cent of non-gipsies were arrested after being caught in the act.

There can be more explanations on the deviation. Theoretically it's possible that gipsies are better at avoiding being caught in the act, but the reason for the sharp difference can rather be that non-gipsies can be involved under the criminal procedure

primarily when they are caught in the act. Therefore it's more likely that a non-gipsy committer avoids taking the responsibility if there's no *flagrante delicto.*

István Tauber, leader scientist of this field, said once: "It has already been written down fourty years ago in the American special literature that people of a bad social status got caught easier, especially if the colour of their skin showed where they belong to. In Central-Eastern Europe level of prejudice is high and police forces have the stereotype that the frequency of criminality among gipsies is much higher. (...) Because of the racial labels gipsy committers are remembered, while all the others are forgotten, and this contributes not only the police but all those who apply the law to become prejudicial."

This rate has changed when examining identity check, which is used usually if centrally commanded, on well-defined directives. These directives may contain directions on controlling gipsy, foreign or dark-skinned persons more often or on concentrating on venues where these people regularly occur. At certain departments — according to our information — the number of identity checks to be accomplished is fixed. All citizens have to take their ID card with themselves and give it to the policeman if asked. One can be arrested and called to account for a minor offence in case of breach of this duty.

Table 2.
Identification of the accused by identity check or traffic control (both juvenile and adult)

Type of crime	Non-gipsies	Gipsies	Aggregate
Petty theft	13	27	17
Theft	23	33	26
Robbery	20	23	22
Aggregate	17	29	20

In every fifth case examined by us it was an identity check when the authorities arrested the charged person. It's hard to decide whether it's a lot or not. However, this rate among non-gipsies was only 17 per cent, as against 29 per cent among gipsies. *This deviation is significant.* In case of more serious crimes differences between identity checks and *flagrante delicto* dicrease. One of the reasons can be that methods mentioned above (e.g. the false acknowledgement among gipsies) work less effectively.

On the other hand, the more serious is the crime, the more important is the identity check, namely more committers involved in the procedure that way. Among committers of theft this rate is one fourth, among committers of robbery it's more than one fifth. This general trend can be noticeable in case of non-gipsies as well, but this doesn't stand on gipsy people, where the identity check is the most successful with thieves: every third is catched like this, which rate is 7 per cent higher than the mean

value and exactly 10 per cent higher than the value observed among non-gipsies. The situation is similar in case of petty theft. Every fourth gipsy committer of petty theft is catched after an identity check, while only every eighth non-gipsy. The deviation from the general mean is as sharp as it was in case of theft.

We found the weakest level of deviation between the ethnical groups (compared to the allover values) in case of robbery, which let us to come to an interesting conclusion. Why do sharp differences that exist in case of less serious crimes equalize on this level? Is it possible that tricks of the police that cause the ethnical inequality do not work here? Or, do ethnical models and makings that made appearance against gipsies more successful in case of theft and petty theft, disappear when someone commits a robbery? By chance, do the police treats robbery as a so serious crime that they make the same efforts on finding gipsy and non-gipsy committers as well?

There's still an other question: why is the effectiveness of identity checks the weakest when searching for robbers? Surely it cannot be the more drooping attention by the authorities what causes this, since this type of criminality is the most dangerous on the society, so that the police is highly motivated on finding the offenders with using the tested methods.

Table 3.
Identity check, traffic control (only adult)

Type of crime	Non-gipsies	Gipsies	Aggregate
Petty theft	14	30	18
Theft	23	36	26
Robbery	19	28	22
Aggregate	17	32	21

There's a sharper difference between the ethnical groups if we take a look at the results of adult offenders, compared to the global model including details of juveniles (17 per cent of non-gipsies, 32 per cent of gipsies). And, although the gap opened between the two groups, altogether the total rate of those who were catched in an ordinary check is almost the same in the model of adults and the global model including juvenile offenders.

The observation does not seem to hold that among adult offenders the more serious is the crime, the smaller is the difference between the two ethnical groups. Even in case of robberies with 9 per cent more gipsy committers are catched with the help of common identity checks. We have to answer the question, why this difference exists in case of adult offenders. *Accepting opinions that at some police departments documentation about gipsy committers used to be collected earlier legally is still in use can account for the bigger success among adults.*

In both groups 22 per cent of catched committers of robberies was arrested after an ID check. But, ethnical differences are remarkable. In case of robberies differences between gipsies and non-gipsies in being arrested like this are compensated in the total model. Among adults difference is significant according to the details above. However, among juvenile offenders the trend observed so far changes, and lower rate (19 per cent) of gipsies charged with a robbery are arrested after an identity check than of non-gipsies (24 per cent). We have to emphasize that it's only in case of robberies and theft (and not petty theft) committed by juvenile offenders that more non-gipsies are arrested after an ID check than gipsies.

Table 4.
Identity check, traffic control (only juvenile)

Type of crime	Non-gipsies	Gipsies	Aggregate
Petty theft	12	18	14
Theft	26	22	25
Robbery	24	19	21
Aggregate	19	20	19

19 per cent of juvenile offenders is catched in an identity check, it's similar to the result among adults and the overall results. However, there is a sharp difference in breakdown by ethnical groups. The number of gipsies arrested this way is only in case of juvenile offenders of theft and robbery shows a lower value than the number of non-gipsies. What makes the importance of this difference bigger is that in all three models (juveniles, adults and allover) ID checks brought in results rather in these cases and not in the case of petty theft. And, finally, among juveniles the difference between ethnical groups and the deviation from the mean values is weaker.

What can be the reason for the differences decreasing like it's written above? May we suppose that the attitude of policemen differs when approaching young or adult gipsies? Or, are they more suspicious facing a youngster? And, is it true that the more serious is the crime, the more acceptable are these assumptions? Surely we find the smallest deviation between the model of juvenile offenders and the other two models in case if petty theft.

In our opinion there are two variables examined by us that can influence the decrease of differences. On one hand it's the location of the crime, on the other hand it's the offender's previous record.

Every fifth person accused with a crime was catched at a simple identity check, and this rate is right either we count cases at smalltown courts or courts of county seats. Seventeen per cent of non-gipsy people charged was catched this way, not depending on the type of the city. The only strong difference is found in case of gipsy persons accused. While in procedures in front of courts of county seats 31 per

cent of charged gipsy people was involved in a common identity check, this rate is only 24 per cent in small cities. It's worth to mention a less strong trend that only in small cities the more serious the crime, the higher the rate of those gipsies who were identified during an ID check. This observation is to be completed with experiences in bigger cities, where results of ID check show being ethnically balanced in case of a robbery. So, the differences between bigger and smaller cities are made of results in cases of theft.

Results above show that in small cities probably they more or less know the possible quarters of committers better and this makes them doing identification with a not so formal sreening, while in a big city every third gipsy accused with a crime is caught at a general screening. For police forces these results show that this procedure is so effective that there is no reason for working out and using a new screening system on a non-ethnical ground, morover, it would be totally against their "interests".

We have to emphasize that values written above are from court files. We do not own any documentation on identity checks or arrests so that we do not know how and for what criterion policemen select people to be checked. All this grows the importance of being able to state with complete certainty that adult gipsy men living in big cities have to reckon upon an ID check with the biggest chance.

Results of the survey are in harmony with the practice of "gipsy lines" among police forces in the seventies and the eighties, when routinish identity check of gipsies was thought to be the most effective way of preventing or at least forcing back "gipsy criminality". There are reports by leader policemen from these decades which tell about "continuous check" of suspicious gipsy persons and territories where they live or occur.

Differences explored in this survey can be explained either with the attention of a higher priority that authorities pay on gipsies, or the effectiveness of their own special social relations ("espionage"). Yet some policemen has reported that the tactics of visiting premises where gipsies live and getting information from members of the community about committers using tools outlawed does exist. The problem is that discrimination in these cases is difficult to be proved, as it is seen from the report of year 2000 of the Parliamentary Commissioner for the National and Ethnic Minorities` Rights:

"Suspicion of discrimination may arise in the other constituent area of the penal code, in the application of the criminal procedure law. For in many cases the individuals under criminal proceedings complain about why they have been brought under the scope of the activities of the investigating authorities and why did the police have to search their homes, and they feel that the police are more suspicious with respect to them than with respect to other potential criminals. Without going into detail, in general, it should be noted that in the case of the investigation of cases where the identity of the perpetrator is not known, the police follow an established regime of procedures. They have to search the location of the crime, check on the

group of potential perpetrators, in the case of which they take into account who had committed similar criminal offences applying the same methods before. In the case of the application of prompt actions of investigation - e.g. searches of homes of suspects - prejudice may influence the operations, however, discrimination can almost never be proven in such cases for the investigating authorities make their decisions relying on data originating from a wide variety of sources, including for anonymous reports."[1]

However, it's possible that the police finds, where it searches. On the other hand, it's definitely easier to search among gipsies, because of their living in clearly separated, contiguous, neighbouring localization in a city or at other premises. From the view of equality before the law the question to answer is: can we expect authorities to pay equal attention to identify or catch supposed committers who were not caught in the act even if their measures turn out to be more effective in case of members of a minority group which can be clearly distinguished after the colour of their skin? *Or, the only reason for higher effectiveness is the attention of high priority itself? As it is seen from some papers written by policemen still during the communist regime, the latter one is more established.*

Table 5.
Identity check, traffic control in procedure against unknown offenders (both juvenile and adult) in per cents

Type of crime	Non-gipsies	Gipsies	Aggregate
Petty theft	18	28	22
Theft	24	25	24
Robbery	31	28	29
Aggregate	21	27	23

We can give a clear idea of this dilemma through a case from the report of year 1999 of the Parliamentary Commissioner for the National and Ethnic Minorities` Rights:

"The teacher of a primary school (…) accompanied his pupils – two girls of Roma origin – into the town to perform certain tasks related to some school competition. The police patrol made him and his pupils descend the bus, emptied the contents of their school bags on the top of the engine compartment of the police car, checked them and then asked for the identification card of the girls. Because of their young age the girls had no identification card, so the policemen contended themselves by asking for and recording their data. The teacher had been told neither at the start nor at the end of the action for the reason of the action. (…) He believed that the girls had to identify themselves specifically because of their Roma origin. (…) The police action had been ordered by the officer on duty of the police

[1] http://www.obh.hu/nekh/en/reports/reports.htm

headquarters because on that same day several citizens reported by telephone that dark skinned pick-pocketing girls with black hair "operated" on the bus and two other reports had also been made against unidentified culprits for pick-pocketing. The police headquarters took the position that the policemen asked the girls to identify themselves in conformity to the provisions of act XXXIV. of 1994 on the police and it was also in conformity to the service regulations of the police that the clothing of the girls were searched. (...) Thus the police headquarters had been basically lawful in the opinion of the chief of police, but in order to avoid the reoccurrence of similar incidents which could be complained about, he believed it to be sufficient to give repeated instructions to the affected police staff. The girls had been subject to identification not because of their origin but because they resembled the girls who had been reported to the police."

Until the late eighties at police stations there were so called "gipsy-lines" that were specialized on "gipsy criminality" and "gipsy criminals". More inquiers state that these old reflexes are still alive in the relation between the police and gipsies. Some think that at some police departments databanks of gipsy criminals are still in use and refreshed regularly, although this method has been qualified to become illegal for years.

*"The stereotype of gipsy delinquency was supported not only by the preconceptions of the majority and the press, but the establishment of the criminal investigation supplied it as well for decades. So-called gipsy-lines had existed until the nineties at police departments and had made an offensive through the medium of the press. Although these lines were abolished at the time of the democratic transformation, being of gipsy origin had been a characteristic sign in the practice of the police since 1996 when the head of the National Police Headquarters wrote in his internal instructions: >**it's against the norms if the police indicates someone using expressions on nationality, ethnic groups or ethnic status when giving descriptions of someone in cases of apprehension or else**<. This paper also made clear that marking ethnical status would have made the investigation easier: >**however, this kind of labelling is unsuitable to identify physical characteristics in most cases and reprehensible as a professional method**<. In spite of these facts, in news on apprehensions of certain journals – when the source is the police – still there are references on the gipsy origin, and, moreover, some other statements make us think that collection of data on gipsy delinquency is still a practice among police forces."*[2]

We cannot take a stand on this question, but surveying the ratio between investigations against known and unknown committers can prove that police forces identify gipsy committers more succesfully. In our model 48 per cent of non-gipsy committers were unknown when starting the investigation, while this rate among gipsy committers is 55 per cent. Forces had data about 51 per cent of non-gipsy committers and 43 per cent of gipsy committers before the procedure.

[2] Gabor Bernath: Of own materials. The notion of roma people in the Hungarian media. In: Beszélő, June 2003.

Distribution by the examined crimes shows a yet more interesting face, and proves the hypothesis we made when checking the difference between the details of identity check and *flagrante delicto.* A sharp difference can be found only in case of petty theft, in view of investigations started against persons unknown. In this case when starting the investigation 37 per cent of non-gipsy committers were unknown, while this rate among gipsy committers was 51 per cent. If we survey this deviation in the relation of bigger and smaller cities, it will be verifiable that authorities will 11 per cent more likely find a gipsy committer than a non-gipsy one, if the procedure goes in front of a court of a small city.

We found an interesting relation between the ratio of gipsies and the effectiveness of investigations. (The effectiveness of investigations is the quotient of the number of succesfully finished investigations and the allover number of investigations.) According to that, in those five counties where the density of gipsies is the highest (in counties Borsod-Abaúj-Zemplén, Heves, Nógrád, Szabolcs-Szatmár-Bereg, Jász-Nagykun-Szolnok the average ratio of gipsies is 9,3 per cent) the results of police forces are outstanding in investigating petty theft, theft or robbery.

Table 6.
Effectiveness of investigations in counties where the density of gipsies is the highest in 2000

County	Density of gipsies	Theft	Burglary	Robbery
Borsod-Abaúj-Zemplén	10,8	1st	2nd	3rd
Heves	7,6	5th	12th	1st
Nógrád	10,3	2nd	1st	4th
Szabolcs-Szatmár-Bereg	10,4	6th	4th	5th
Jász-Nagykun-Szolnok	7,5	9th	3rd	2nd
Average*	9,3	4,6	4,4	3

**The amount of the lowest rankings (1-5.) equals 15, therefore their average is 3*

It's right to say that it was arbitrary to choose the details of one year and to draw conclusions from those. However, if we take the average details of five years between 1996 and 2000, the result will be similar. The investigation of all three examined delicts was six to nine per cent more succesful on a par compared to the mean of rates of all 19 counties. (If we took the results of the capital, Budapest, into account, the difference would have been about eleven to twenty-four percent, but it would not have been correct according to the fact that criminality of a big city differs very much from other kinds and the task of police forces is much more difficult.)

Table 7.
Effectiveness of investigations in counties where the density of gipsies is the highest between 1996 and 2000 (in percents)

County	Density of gipsies	Theft	Burglary	Robbery
Borsod-Abaúj-Zemplén	10,8	44,68	37,24	70,66
Heves	7,6	33,11	29,42	71,65
Nógrád	10,3	42,54	40,89	67,62
Szabolcs-Szatmár-Bereg	10,4	36,60	38,06	64,64
Jász-Nagykun-Szolnok	7,5	30,28	32,82	68,51
Average of these 5 counties	9,3	37,44	35,69	68,62
Average of all counties	5,1	31,74	28,48	59,30
County-wide average	4,5	26,01	24,65	46,35

The result is similar, if we survey the indexes of clearing up in the examined period of time. (The simple definition for index of clearing up is the quotient of crimes cleared up after starting investigation against a person unknown, and the total number of investigations against committers unknown.) According to this, between 1996 and 2000, 47,64 per cent of investigations started against persons unknown finished with a result in counties here the density of gipsy population is the highest, while this rate is significantly lower (42,2 per cent) in counties Csongrád, Fejér, Győr-Moson-Sopron, Vas, Veszprém, where the less gipsies live.

The difference will be even more spectacular, if we take a look at the details from main district police forces of both three countries of the highest and the lowest density of gipsies. The average effectiveness for five years is 51,32 per cent in counties Borsod-Abaúj-Zemplén, Nógrád and Szabolcs-Szatmár-Bereg (where the ratio of gipsy population is 10,5 per cent), while it was 40,24 per cent in counties Csongrád, Fejér and Győr-Moson-Sopron (where the ratio of gipsy population is 1,6 per cent). Therefore. while the gipsy population is six and a half times smaller in these counties, police forces work with a significantly, 20-25 per cent lower effectiveness than they do in gipsy-dense districts.

Table 8.
Effectiveness in per cents in finding unknown committers on average of years 1996-2000

Country-wide average including Budapest	37.76
Country-wide average not including Budapest	43.65
Borsod-Abaúj-Zemplén County	52.90
Nógrád County	53.44
Szabolcs-Szatmár-Bereg County	47.62
On average of three counties where the density of gipsies is the highest	51.32
Csongrád County	45.15
Fejér County	39.34
Győr-Moson-Sopron County	36.22
On average of three counties where the density of gipsies is the weakest	40.24

Of course it's pleasing if the index of the effectiveness of investigation is higher, while the opposite is depressing. The difference itself is not enough to indicate the unlike relation between the police and gipsies, and is not enough as well to prove discrimination. But, it's worth to compare the effectiveness to the frequency of delicts come to light.

Table 9.
Number of delicts became known and the frequency among every 10000 inhabitants in the average of years 1996-2000

Counties	Number of delicts in the average of five years	Population (x1000)	The frequency of delicts among every 10000 inhabitants in the average of five years
Borsod-Abaúj-Zemplén	27 129	733	370,3
Nógrád	7 469	217	344,2
Szabolcs-Szatmár-Bereg	22 028	571	386,2
On average of three counties above	56 626	1 521	369,6
Csongrád	19 691	419	469,6
Fejér	18 981	425	446,3
Győr-Moson-Sopron	21 338	424	502,9
On average of three counties above	60 010	1 268	472,9

Although the rate of criminality (counted proportionally to the population) is 30 per cent bigger in counties where density of gipsies is the lowest, the effectiveness of investigation is 25 per cent higher in territories where the number of gipsy people is the most. This is surprising in the light of the popular belief that among gipsies there is a higher ratio of crime than among non-gipsies; and, moreover, it's hard to clear up a crime committed by an unknown gipsy committer. **In their totality, statistics seem to be contrary to that consistent opinion which was explored in a research among policemen, that** *"it's easier for police forces where there are no gipsies at all, moreover, the presence of gipsies hinders the work of policemen."*

There's a widely held view in the society and among police forces as well that the level of crime would be much lower without gipsy delinquency. We don't want to state on the opposite that without gipsies criminal investigation would be in trouble, but the details mentioned above show that it's easier for the police where density of gipsies is bigger, because it's more likely that an unknown gipsy committer of a crime becomes detected than a non-gipsy one.

Of course it's an important social interest that all committers of crimes must be catched and called to account, but extreme control and discriminative treatment against gipsies is problematic even from two different points of view. On the one hand, if members of an ethnical minority are subject to an extreme police control (only because it is clearly seen from the colour of one's skin or the quality of one's clothes, or according to one's place of residence, social status or domestic relations it is likely that one belongs to this minority), that harms the equality of rights guaranteed by the Constitution of the Republic of Hungary, and the act on equal chances. On the other — practical — hand, if (according to the need of efficiency and less difficulties in identification of gipsies) police extremely concentrate on controlling minority communities, than it will take the forces away from less succesful fields of investigation. "Easier success" that can be reached in catching gipsies who committed a crime produces the false illusion of effectiveness among policemen, because in criminal statistics stealing of firewood or robbing a jewellery are equal details in value.

■ Balázs Fekete

The Fragmented Legal Vocabulary of Globalisation

Reflections on the book entitled Global Law Without a State (*Global Law Without a State* edited by Gunther Teubner (Aldershot-Brookfiled USA-Singapore-Sydney: Darmouth 1997) xvii+305 p.

I. Preliminary observations

The impact of globalisation has fundamentally changed the regular scientific framework of social sciences that developed throughout the 19th and 20th centuries. Each of its branches has started an adaptation process related to the profoundly transformed circumstances of the global environment. In the 21st century any social fact could attain a different meaning from the regular one as a consequence of the new global conditions. It was anticipated that legal sciences, especially legal theory must integrate into his framework the impact of globalisation. Nevertheless this process of integration has started slowly and nowadays the science of legal theory has no comprehensive framework to interpret the phenomenon of globalisation. Otherwise legal theory seems to have difficulties in reacting to globalisation because post-modernity has raised many unanswered questions concerning the general background of social sciences and especially that of legal theory. However, the existence of this uncertainty does not mean that the research of this phenomenon from legal point of view would not be necessary.

One of the early attempts to make use of the experiences of globalisation in order to enrich the science of legal theory and legal sciences in general, is the book entitled "Global Law Without a State." It seems to be a very promising volume, and it could prove to be useful to analytically revise its conceptual background. This conceptual background probably has suggestions about the possible interpretations of the phenomenon of globalisation within the framework of legal sciences. Prior to analysing the book in further detail, it may be useful to dedicate a few sentences to the phenomenon of globalisation.

II. One of today's most frequently used words: Globalisation

The sole thing different authors agree on is that the phenomenon of globalisation exists. They all note that something is happening in the world that has never happened before. The essence of global conditions has changed gradually; anyone can sense that since the end of the Second World War the world has undergone a major transformation. There is something curious and unprecedented regarding the differentiating characteristics of our era. This curiosity is globalisation. But — until now — authors and researchers were incapable of creating a common comprehensible framework by interpreting the changes of the last decades. Therefore, since there is little chance to grasp the essence of globalisation easily, the only possibility remaining is to outline a few dimensions of the greatest social phenomenon of our time.

i. Economic interpretations

The majority of scholars — mainly economists —approached the phenomenon of globalisation from an economic point of view. These economic analyses are competing with each other just as much as the possible interpretations of globalisation, so it is difficult to find their common denominator. Another problem is that some of these scholars approach the subject with a descriptive attitude, while others rather apply the political attitude, that every time implies some sort of an evaluative step. Hence the brief presentation of two possible examples of the above-mentioned interpretations may prove to be solely illustrative.

John H. Dunning has made an attempt to analyse the most important features of this new era. He names this era 'global capitalism.' According to Dunning our age is the third stage of market-based, western-styled capitalism. Following the age of pre-industrial capitalism, which was mainly land and agriculture based, and the industrial, machine and finance based second phase of capitalism, a radically new economic phenomenon has emerged in the last decades of the 20th century. This new form of capitalism is now mainly knowledge-based and has a global dimension in contrast to the spatial diffusion of the earlier stages. Dunning collected five distinctive features of this new economic world order; (i) cross-border transactions are deeper and more interconnected than they have ever been, (ii) resources, goods and services are spatially more mobile than they have ever been, (iii) multinational enterprises play a more significant role in the creation and distribution of wealth than they have ever done before, (iv) the financial and real volatility has increased in a considerable degree, (v) the advent of digital environment and electronic commerce has completely changed the character of cross-border transactions.[1] These features could be eligible to encompass and define the distinguishing features of the new world economic order, but that is an other question whether this descriptive framework is a satisfactory attempt to explain and understand the essence of globalisation.

[1] Dunning 11-40 esp 13.

A considerable representative of political economy, Robert Gilpin[2] argues that a successful and manageable international economy is dependent on the secure and safe political foundation of international relations.[3] Discussing the importance of political foundations the author seriously questions the dogmatic statements of neo-liberal economic thought concerning the irrelevance of political factors in the economic sphere. According to Gilpin a stable world economy has three political preconditions: firstly, a single one or a group of nations has to promote economic and political leadership by maintaining stable macroeconomic conditions and establishing fair and impartial rules to govern the international trade system; secondly, this economic system shall be based on cooperation among the major economic powers, because neither of them could manage the system alone; thirdly, every nation of the world has to have confidence in free-trade and other forms of international commerce.[4] It seems that for Gilpin, after the dramatic fall of Seattle WTO summit of 1999, the essence of globalised economic processes is paradoxically rooted in the global political context, rather than in pure economic indicators. Thus, deriving from the analysis of Gilpin, globalisation also has a strong political dimension that can essentially determine the main direction of global economic processes. Therefore Glipin's work indicates the necessity of a deep analysis of these differing political aspects of globalisation.

ii. Other ways of interpretation …

Other approaches of the issues globalisation raises are even less consistent than the economic interpretations. Therefore it is very difficult to find any common points of them except for the rejection of the exclusively economic interpretation. These works sometime use the results of economic analyses, sometime they do not. Moreover, they often try to integrate other factors into their researches, such as world politics, environmental protection, cultural elements and other problems, to give a few examples of features worth analysing. To show the richness of these kinds of analyses it may be useful to briefly overview two of them.

The famous French professor and publicist, Ignatio Ramonet criticizes globalisation taking a very elaborated and 'orthodox' Marxist point of view as his starting point. He claims that for him the essence of globalisation is the unprecedented growth of inequalities. The main reason behind this serious phenomenon is the all-embracing dominance of the economic sphere over all of the other fields of life. Liberalisation, privatisation and competitiveness have been the key-words of world economy in the last decades of the 20th century. Through stressing them continuously and noisily, the

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[2] Robert Gilpin *The Challenge of Global Capitalism – The World Economy in the 21st Century* (Princeton and Oxford: Princeton University Press 2002) see specially the Preface and Chapter Ten: Globalisation and Its Discontent

[3] Robert Gilpin *The Challenge of Global Capitalism* … xv. p.

[4] Robert Gilpin *The Challenge of Global Capitalism* … xv. p.

economy gradually overruled the states and civil societies. The unipolarity of the world order that followed the fall of the iron curtain in 1989 also supports the dominance of neo-liberal values represented today by the official politics of the US. Thus, in Ramonet's eyes globalisation — that has economic, political and environmental aspects — has a really negative connotation, that represents the neverseen inequality of the world economic system, as well as the overall dominance of neo-liberal ideas. Ramonet argues that only the emergence of a global civil society — based on the fundamental values of solidarity and depoliticisation — can counterweight the pressure of global economic processes and actors.[5]

Although the famous work of Samuel P. Huntington does not explicitly deal with the phenomenon of globalisation, some of its conclusions can be very constructive contributions to the understanding of it. Huntington connects the emergence of a universal civilisation with the all-embracing process of modernisation. The counter points of these modern societies are traditional societies that were based mainly on agriculture, contrary to the industrial and knowledge bases of modern societies. Yet Huntington argues that to identify modern societies with Western societies is an absolutely false simplification, because the originality of Western civilisation is not rooted exclusively in modernisation. Huntington enumerates the significant distinguishing characteristics of Western civilisation to verify his earlier statement. Those are — in brief — the legacy of classical antiquity, the Catholic and Protestant religious traditions, the diversity of European languages, the theoretic separation of spiritual and 'temporary' authorities, the idea of the rule of law, the theory of social pluralism, the emergence of representative bodies and individualism.[6] The author emphasises that these elements can possibly develop in other civilisations, but the unique combination of them gave the West its distinctive feature. Why is this essential from the aspect of globalisation? Huntington's clarification of modernisation and his list of elements of Western identity can show the conceptual background from which the process of globalisation has stammed in the last decades of the 20th century. Through indicating the possibility of the clash between the dominant civilisations Huntington reminds us of the dangers the triumph of the universal globalisation process poses based mainly — but not exclusively — on Western characteristics.

III. Major words of the vocabulary

A possible way to discover the volume's main statements could be via the presentation of its conceptual background, through the peculiar system of a quasi-vocabulary. The 'message' of the whole book takes shape by collecting and analysing the most important concepts of its authors. Nevertheless, being familiar with this

[5] See: Ignatio Ramonet *Guerres du XXIe siécle – peurs et menaces nouvelles* (Paris: Éditions Galilée 2002) [Collection l'espace critque]

[6] Samuel P. Huntington *The Clash of Civilisations* ... 69-72. p.

conceptual background does not supplant a detailed knowledge of the whole book, it can only give a sketch of the most important contours.

i. Legal pluralism

The theory of legal pluralism provides for the general theoretical background of the authors' works. Every author incorporates legal pluralism — implicitly or explicitly — into his or her work in one form or another. Therefore it is worth knowing precisely how the authors interpret this major stream of legal thinking. In his introductory study Gunther Teubner discusses in detail his own concept of legal pluralism[7]. According to Teubner the new phenomenon of global law can only be adequately explained by the above-mentioned theory, but it is necessary to transform it parallel with the new conditions of the profoundly changed global environment.[8] Since the early years of the 1940s, when the concept of legal pluralism has firstly emerged in the work of Llewellyn and Hoebel — in their volume entitled The Cheyenne Way -, and has crystallised in the 1950s through the famous researches of Pospišil, this theory has focused on the interrelationship between the different dimensions of law: the law of the state and the diverse laws of the different communities. Teubner argues that in order to make the theory of legal pluralism eligible to the explanation of the new global legal phenomena, it is necessary to reformulate its core concepts by shifting the focus from diverse groups and communities to different discourses and communicative networks.[9] By shifting the scope of legal pluralism from the communities to the communicative processes the theory is ready to adequately explain the phenomenon of global law, because it is more able to incorporate into its general background the most of the new and thus revolutionary legal phenomena. Teubner also reminds the readers that the main distinctive feature *(distinction directrice)* of the legal phenomena is the use of the binary code: legal/illegal.[10]

With these remarks Teubner accepts Luhman's interpretation of law and integrates Habermas' theory of communication into his pluralistic legal theory. Thus, this reconstructed concept of legal pluralism via the integration of the main elements from the oeuvre of Luhman and Habermas forms the general and broad background of all further research presented in the volume. With the elaboration of this new form of legal pluralism Teubner has created a comprehensible framework, which seems to be eligible — even from a narrow theoretical point of view — to the detailed research of the new global legal phenomena. Therefore it is easy to understand Jean-Philippe

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[7] Gunther Teubner „Global Bukiwona: Legal Pluralism in the World Society" in *Global Law Without a State* ed by Gunther Teubner (Aldershot, Brookfield USA, Singapore, Sydney: Darmouth 1997) 3-28. p.

[8] Gunther Teubner „Global Bukowina: …" 4. p.

[9] Gunther Teubner „Global Bukowina: …" 7. p.

[10] Gunther Teubner „Global Bukowina: …" 14. p.

Robé's statement that the theory of legal pluralism is the key concept of a post-modern understanding of law.[11]

ii. Global law

As a starting point of his discussion of the nature of global law, Teubner uses the concept of 'living law'coined by Ehrilch. Quoting a statement of Ehrlich[12], the author declares global law a *sui generis* legal order, which has its own characteristic and therefore "should not be measured against the standards of national legal systems."[13] He claims that global law does not have any structural deficiencies compared with national laws, its special characteristics distinguish it from the 'normal' law of nation states. The most characteristic feature of the global legal regime is its lack of any form of political and institutional support and its strong connection with socio-economic processes.[14] So it is a depoliticised body of rules, however, this depoliticisation does not inevitably mean that the emerging global law is value-neutral, as, for instance, some activities of MNEs proved it.[15]

How can the origin of this new legal phenomenon be determined? In his chapter Teubner rejects the 'traditional' political and institutional theories of law-making, those processes, within which the nation state plays a prominent role.[16] After rejecting the 'traditional' concepts of legal thinking, the author follows the above-mentioned theory of Ehrilch concerning the autonomous law-making of society. Since globalisation is reality, it has a uniquely distinctive feature: parallel with the globalisation of economic processes the emergence of a countervailing world society under the leadership of interstate politics is missing, therefore, it is a highly contradictory and fragmented process.[17] As a result of this lack of 'world politics' "global law will grow mainly from the social peripheries not from the political centres of nation states and international institutions."[18] Thus, global law does not have any contact with the traditional political institutions of law-making, it is growing out from diverse and fragmented social

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[11] Jean-Philippe Robé „Multinational Enterprises: The Constitution of a Pluralistic Legal Order" in *Global Law Without a State* ed by Gunther Teubner (Aldershot, Brookfield USA, Singapore, Sydney: Darmouth 1997) 56. p.

[12] "The center of gravity of legal development therefore from time immemorial has not lain in the activity of the state, but in the society itself, and must be sought there at the present time" Gunther Teubner „Global Bukowina: …" 3. p.

[13] Gunther Teubner „Global Bukowina: …" 4. p.

[14] Gunther Teubner „Global Bukowina: …" 4. p.

[15] Peter T. Muchlinski „'Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-making community" in *Global Law Without a State* ed by Gunther Teubner (Aldershot, Brookfield USA, Singapore, Sydney: Darmouth 1997) 102-103. p.

[16] Gunther Teubner „Global Bukowina: …" 6. p.

[17] Gunther Teubner „Global Bukowina: …" 5. p.

[18] Gunther Teubner „Global Bukowina: …" 7. p.

institutions that are actually closely coupled with the specialised — mainly economic — dimensions of globalisation.

Teubner indicates that the lack of a global political system and some global legal institutions may cause problems in the establishment of a global legal discourse. The lack of global politics shall be a serious problem because it is very difficult to imagine a global symbol of validity that is neither rooted in national laws, nor has any political support on global level.[19] At this point Teubner establishes a unique concept to solve this theoretic problem that can be termed a paradox as well. He claims that through the "deparadoxification" of the phenomenon of the so called 'self validating contract' *(contrat sans loi)* it is possible to explain how global law, that is primarily contract based, creates its own non-contractual foundations for itself. Via impressive argumentations, using the example of a special sort of commercial contracts, the so-called "closed circuit arbitration" contracts, Teubner solves this paradox through transforming the vicious circle of contractual self-validation into a virtuous cycle of two legal processes: contracting and arbitration.[20] With this "deparadoxification" Teubner proves that it is largely possible to make law without the intervention of the state into the law-making process. From this point on, a private legal order, that has global validity, is not longer unthinkable, for instance, the law of multinationals or *lex mercatoria,* both of which shall be discussed later.

Finally, the author collects four important features of the emerging legal phenomenon: (i.) the boundaries of this sort of a legal phenomenon are determined by 'invisible social networks' or 'invisible professional communities,' therefore they transcend territorial boundaries, (ii.) "global law is produced in self-organized processes of 'structural coupling' of law with ongoing globalised processes of a highly specialized and technical nature,"[21] (iii.) global law is not as insulated from the on-going socio-economic processes than 'normal' national law, it is closely dependent on them, (iv.) it is necessary to preserve the variety of legal sources of the globally unified law, because a total unity of global law would become a real threat to legal culture.[22] It is clear that these characteristics are fundamentally different from the traditional law of nation states, and according to Teubner they can partly prove the individual nature of global law.

iii. World society

Can we talk about world society nowadays? If so, how can we define its *genus proximum*? If world society exists, can it be a general milieu of global law? In his chapter Anton Schüzt attempted to sketch the contours of world society via the

[19] Gunther Teubner „Global Bukowina: …" 15. p.

[20] Gunther Teubner „Global Bukowina: …" 16-17. p.

[21] Gunther Teubner „Global Bukowina: …" 8. p.

[22] Gunther Teubner „Global Bukowina: …" 7-8. p.

deconstruction of classical conceptions of social and political theory[23]. His starting point is the autopoetic theory of Luhmann but he emphasises that the essence of autopoetic social theory is the deconstruction of the traditional cosmomorphic models.[24] Schütz unambiguously rejects that the distinction between system and environment can create a model where a system can encapsulate subsystems as their greater environment. The invention of the autopethic theory is the chance to liberate social thinking from the dominance and pressure of traditional social, political and legal concepts, that are rooted mainly in some from of hierarchy, as for example are sovereignty, state, power and law, and rebases it on the idea of heterarchy.[25] After the devaluation of the foundations of these concepts that incorporate some form of at least a bi-polar hierarchical relation, world society can theoretically be reconstructed.[26] According to the author these 'traditional' ideas are incapable of explaining our days' challenges that globalisation generated after the post-modern 'revolution'.

World society is founded on a "never ending cacophony of simultaneous conversations" on an order generated by noise instead of any mastery.[27] Schütz argues that world society is a *par exellence* challenge to the concept of the primacy of politics, because world society is not based on consensus but rather on the simultaneously ongoing communicative processes.[28] So the world society of Schütz does not have any external, spiritual or higher level mastery or control. It is 'based on' the refusal to take any responsibility for the activities of the others. The multiplicity of communications — the continuous noise — is capable of leading the affairs of world society without the intervention of any higher level, may that be real or fictional, moral or legal. It could be the 'realm of anything goes' as Schütz describes the world of economy.[29] The concept of Schütz is really exciting but it is highly questionable whether in the years of worldwide uncertainty — just think about the humanitarian, economic and environmental crises after 1989 — the disintegration of the remained moral basis of social and political thinking and the mystification of a value-neutral attitude would help the normalisation of the situation.

iv. Lex mercatoria

We can define *lex mercatoria* as a body of transnational law serving for the special purposes of word-wide economic transactions. Teubner argues that *lex mercatoria* is

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[23] Anton Schütz „The Twilight of the Global Polis: On Losing Paradigms, Environing Systems and Observing World Society" in in *Global Law Without a State* ed by Gunther Teubner (Aldershot, Brookfield USA, Singapore, Sydney: Darmouth 1997) 257-293. p.

[24] Anton Schütz „The Twilight of the Global Polis: …" 262. p.

[25] Anton Schütz „The Twilight of the Global Polis: …" 275. p.

[26] Anton Schütz „The Twilight of the Global Polis: …" 257-269. p.

[27] Anton Schütz „The Twilight of the Global Polis: …" 269. p.

[28] Anton Schütz „The Twilight of the Global Polis: …" 283. p.

[29] Anton Schütz „The Twilight of the Global Polis: …" 285. p.

the most successful example of global law[30], he indicates that this legal phenomenon incorporates all the characteristics that would be able to surpass — and to refute partly - the nation state based 'traditional' theories of law-making. *Lex mercatoria* is a paradigmatic case, and the experiences arising from it shall be important for all other emerging field of global law, therefore it is worth going into the details of this unique legal phenomenon.[31] The author expounds briefly the history of the "thirty years" war over the independence of global *lex mercatoria* and emphasises that the traditional schools of legal thought dominated by the overestimated role of the nation state — represented mainly by French and American scholars — were incapable of properly explaining the fundamental questions of global *lex mercatoria.* In order to give a proper explanation, it is necessary to break the taboo of the necessary connection of law and state. The phenomenon of *lex mercatoria* breaks down this taboo from two different directions. Firstly, it claims that 'private orders' can make law valid law, without the control and authorisation of the state. Secondly, this means that this body of legal rules — produced merely by 'private orders' — is valid outside the nation state and international relations also.[32]

At this point Teubner poses a crucial question: does a global "rule of recognition" exist for *lex mercatoria*? He claims that it is a law with an underdeveloped 'centre' and highly developed 'peripheres', therefore one shall look for the"rule of recognition" on these 'peripheres'.[33] So this legal regime of international business can be typified by the asymmetries of a weak institutional centre, which depends on strong socio-economic 'peripheries' stamming from the special circumstances of its global environment. As in the case of global law, Teubner here also tries to outline the main features of the examined legal phenomenon. The overriding feature is that *Lex mercatoira* is structurally coupled with economic processes, therefore it is very vulnerable to the interests and power pressure of economy. This openness might corrupt the originally value-neutral *lex mercatoria.*[34] *Lex mercatoira* seems to be an "uncoordinated ensemble of many small domains, a patchwork of legal regimes"[35] as the legal system of the *Heilige Römische Reich Deutscher Nation*. This means that commercial arbitration institutions — for instance the *Chambre de Commerce International* — are strong in the production of precedents (episodes), but they are inefficient communicatively linking them up with each other in order to produce a unified legal doctrine. Thus, the institutional background of *lex mercatoria* seems to be not as efficient and solid as the actors would need it, moreover, it is weak from the point of view of the — above mentioned — communicative links.[36] Lastly, *lex mercatoria* is a soft law mainly consisting of broad principles, not precise rules.

[30] Gunther Teubner „Global Bukowina: …" 3. p.

[31] Gunther Teubner „Global Bukowina: …" 8. p.

[32] Gunther Teubner „Global Bukowina: …" 10-11. p.

[33] Gunther Teubner „Global Bukowina: …" 12. p.

[34] Gunther Teubner „Global Bukowina: …" 19. p.

[35] Gunther Teubner „Global Bukowina: …" 20. p.

[36] Gunther Teubner „Global Bukowina: …" 20. p.

Teubner argues that this is not a deficiency because it compensates the lack of global enforceability by making it more flexible and adaptive to the rapidly changing global circumstances and unprecedented cases.[37]

In his chapter, Hans-Joachim Mertens is dealing with the problem of the application of *lex mercatoria*.[38] According to him there are two possibilities to define the essence of *lex mercatoria*. *Lex mercatoria* can be approached as a body of international legal practice if the legal system is defined as a system of norms. In this case *lex mercatoria* accounts for an independent legal system.[39] On the other hand, *lex mercatoria* can be regarded as a self-applying system beyond national law. From this point of view it seems to be an autonomous legal system independent of national law.[40] However these definitions do not guarantee a common understanding of this issue therefore it could be more useful to regard *lex mercatoria* as a potential to create norms in order to avoid the endless terminological debates. From this point of view this body of rules is a nearly complete potential for the resolution of international, commerce related conflicts.[41] Mertens argues that national monopoly of law-making is out of date today, thus exists only in theory, because in a number of cases the arbitrators have the rules of *lex mercatoria* at hand to apply. The explicit or tacit agreement of the parties is enough to establish the application of an independent body of law, and the necessities of global society are also in support of the applicability of *lex mercatoria.* Nevertheless, Mertens stresses the necessity of a special justification to the application of these rules, and emphasises the responsibility of the arbitrator when applying them.[42] These remarks are significant because Mertens precisely points out the immanent limits of the autonomous system of *lex mercatoria*.

v. Multinational enterprises

MNEs are the most important players of today's economic world order. Until the publication of this volume the *communis opinio doctorum* regarded them as major economic actors from an exclusively economic point of view. It made no attempt to develop a comprehensible framework to interpret their legal aspects. Therefore the two studies of the book dedicated to the issue can be regarded as serious efforts towards the establishment of such a framework, which can deal with the legal dimensions of the existence of MNEs. Jean-Philippe Robé[43] sets out to analyse

[37] Gunther Teubner „Global Bukowina: …" 21. p

[38] Hans-Joachim Mertens *„Lex Mercatoria:* A Self-applying System Beyond National Law?" in *Global Law Without a State* ed by Gunther Teubner (Aldershot, Brookfield USA, Singapore, Sydney: Darmouth 1997) 31-43. p.

[39] Hans-Joachim Mertens *„Lex Mercatoria: …"* 32. p.

[40] Hans-Joachim Mertens *„Lex Mercatoria: …"* 33. p.

[41] Hans-Joachim Mertens *„Lex Mercatoria: …"* 35-36. p.

[42] Hans-Joachim Mertens „Lex Mercatoria: …" 39-40. p.

[43] Jean-Philippe Robé „Multinational Enterprises: …" 45-77. p.

the fundamental questions of MNEs, while Peter T. Muchlinski[44] observes MNEs as transnational law-making bodies.

The main issue of Robé's work is the nature of multinationals. According to his opinion the enterprise is only a socio-economic paradigm, not a legal concept, because it does not exist in the positive law of states. The positive national legal systems work with different concepts of legal persons (or *personnes morales*) but they never define the enterprise as an explicit legal person. Therefore Robé claims that the enterprise is an autonomous legal order, which does not need state recognition as a prerequisite to its existence. The author describes it as a unitary, closed and unique order that can define 'norms' for the persons under its jurisdiction and can create coercive means to guarantee respect for these 'norms'. Thus with the use of these mandatory internal behavioural rules the enterprise constitutes a legal order in the classical Werberian meaning.[45] Robé stresses the fact that every MNE has its own legal character so "each enterprise represents an island of law having the character of a truly legal order."[46] The emergence of such global deterritorialized legal orders — as Robé finally defines the MNEs — is a serious challenge to monist legal concepts. Only the pluralistic attitudes can incorporate the existence of partial — both territorial and functional — legal orders that are competing and cooperating at the global level, within a global legal system.[47]

According to Robé's hypothesis, each MNE constitutes an autonomous legal order. The next question is thus given: what is the origin of this constitutive power? He argues that this situation is an unambiguous consequence of classical liberal principles, that were incorporated into all liberal constitutions. The protection of property and the acknowledgement of the freedom of contract has produced such a legal framework where enterprises and after them MNEs could be born. So the nationalisation of law never resulted in the disappearance of legal pluralism in modern nation states.[48] Hence, the power of MNEs is derived from the classical principles of liberal constitutions, and this fact opened the possibility to create autonomous legal orders that are equivalent to that of the states from a legal point of view. The internationalisation of these liberal principles facilitated the evolution of a transnational civil society, where the major players are the MNEs and — maybe — the states.[49] For instance, in the US a newly emerging constitutional order is imaginable based on the

[44] Peter T. Muchlinski „'Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community" in Global Law Without a State ed by Gunther Teubner (Aldershot, Brookfield USA, Singapore, Sydney: Darmouth 1997) 79-108. p.

[45] Jean-Philippe Robé „Multinational Enterprises: …" 52. p.

[46] Jean-Philippe Robé „Multinational Enterprises: …" 53. p. and the author indicates that the legal substratum of MNEs contains of contracts and property rights — which are fragmented in the positive law of states — as well as the MNEs have a unity of command, logic and rules, see 45. p.

[47] Jean-Philippe Robé „Multinational Enterprises: …" 49. p.

[48] Jean-Philippe Robé „Multinational Enterprises: …" 57. p.

[49] Jean-Philippe Robé „Multinational Enterprises: …" 62. p.

separation of powers between MNEs, states and the federal government.[50] This new 'style' of the division of power illustrates how the existence of MNEs can transform the realm of traditional legal concepts and theories.

In the other above-mentioned chapter Muchlinksi sets out from a statement of Teubner; the new living law of the world can be defined as "the proto law of specialized organizational and functional networks which are forming a global, but sharply limited, identity."[51] Muchlinski claims that some of the operational activities of MNEs show such a 'proto law' or 'law like' qualities, therefore it is worth examining them in detail. On the one hand the internal system of business organisations can be regarded as aspects of an emerging global law according to the meaning given by Teubner. If we think about law as communicative process based on the distinction of legal/illegal, three major groups of MNEs' internal activities can partially fall under this standard. According to Muchlinski certain cases within the managerial control, some of the contractual relations between the affiliated entities in the whole transnational network, and lastly, the adoption of intraenterprise codes of conducts as general guidance of behaviour.[52] Muchlinksi also indicates that these are not solid concepts with precise boundaries, there are many uncertainties in the interpretation of them, but some of them can be defined as cases of such a 'proto law'. If these operational activities demonstrate a considerable degree of consistency and generality of practice, these two characteristics can facilitate the acknowledgement of their 'proto law' nature. The existence of a binding duty shared by not only the directly involved persons can also strengthen the 'law like' quality of those internal activities.[53] On the other hand, MNEs can influence the external legal environment, and this activity can be an important way to convert their own 'proto law' into 'hard law' status. The activities of MNEs can directly influence the development of substantive rules of commercial law by their standardised contracts or commercial practices. Henceforth, they can affect the generation of whole national and international regimes via lobbying activities.[54] A result of these influencing activities could be the emergence of a global business law that may constitute a new world order with newly born legal principles and institutions.[55] The author emphasises many times that his consequences are not really unambiguous, in certain cases they do not have solid outlines, but indeed it is very essential to research the 'law like' phenomena of MNEs in order to understand their operations.

[50] Jean-Philippe Robé „Multinational Enterprises: …" 71. p.

[51] Gunther Teubner „Global Bukowina: …" 7. p.

[52] Peter T. Muchlinski „'Global Bukowina' Examined: …" 80-81. p.

[53] Peter T. Muchlinski „'Global Bukowina' Examined: …" 85. p.

[54] Peter T. Muchlinski „'Global Bukowina' Examined: …" 85. p.

[55] Peter T. Muchlinski „'Global Bukowina' Examined: …" 86. p.

vi. State

Although neither chapter of the book specialises on the questions of state explicitly, the studies reflect a solid attitude concerning it. Therefore it is useful to analyse how the authors look at the state, because it shows certain outlines of the post-modern conception of state. Starting from the theory of legal pluralism it is unambiguous that the authors want to liberate the legal thinking from the dominance of the nation state. Before the emergence of global law the centre of gravity of law and politics obviously was in the nations state, the authors argue, but by the appearance of the first fragments of global law this situation has been seriously challenged. In consequence of the prominent role of the internal dynamics and plurality of 'global society,' moreover, its highly specialised sub-systems in the evolution of global law the traditional political theories of law are not capable any longer of understanding the global law, argues Teubner.[56] Thus, the emergence of global law could be a serious chance to rethink the role of the state in the legal thinking or in legal processes.

Talking of *lex mercatoria,* Teubner proves in detail that it is possible to create law exclusively by 'private orders' and this type of law will be valid without the recognition of the state. Mertens supports this approach when he claims that the national monopoly of law-making is a simple illusion, because the arbitrators can base their decision on the rules of *lex mercatoria* independent of state, without any material obstacles.[57] It can clearly be observed that the authors try to establish the foundations of such a legal science where the state does not have a prominent role in legal issues, it is no more than an actor in the field of law amongst many equally significant actors. In the global or world society of the future the cases of autonomous law-making — *lex mercatoria,* internal law of MNEs, and other meanwhile appearing special areas - could be much more important than the 'normal' field of law-making where the dethronised state might be involved. Following this line of thought it is easy to imagine that in the affairs of the world society of the future the state will not have any serious relevance.

The growing significance of MNEs as independent legal orders strengthens the earlier conclusion. If every MNEs constitutes an independent and unique legal order, and these legal entities are diffusing beyond and between national borders the exclusivity of state sovereignty will not be maintainable in the long run. Otherwise Robé acknowledges that the security structure of the world still based on the nation states, but the emergence of MNEs has weakened the traditional framework of diplomacy and other state-specific actions. Diplomacy between states and MNEs could be more considerable in certain — mainly economy and business related — cases than the traditional diplomacy between nation states. The proliferation of international organizations as representatives of partial economic interests — for

[56] See: Gunther Teubner „Global Bukowina: …" 5-6. p.

[57] See: Hans-Joachim Mertens *„Lex Mercatoria: …"* 39-40. p.

example: WTO, certain free-trade zones and specialised representative bodies — has also altered the traditional 'playground' of interstate diplomacy.[58]

The main question raised by these well-founded conclusions concerning the state is the following: does the fundamental transformation of the modern context of statehood, indicated by the emergence of global society and law, follow the disappearance of the state as a general social phenomenon? It shall not be forgotten that the main characteristic of this developing global regime is the lack of any 'traditional' political background at global level, or the lack of politicisation, in accordance with Teubner. Is it possible that the dream of Engels shall be realised via the gradual emergence of global law and society? Nobody can be brave enough to answer this question with full certainty. It is only possible to indicate a contribution to the interpretation of this serious question. Statehood was never a monolithical concept, its precise outlines have changed continuously parallel to the transformation of the social context. The Greek idea of *polis* differs from the medieval concept of *regnum* and both notions differ from the modern concept of the nation state that is basically founded on the sovereignty doctrine of Bodin and on the monopolisation of coercion as in the theory of Weber. Therefore, it is thinkable that parallel to the emergence of global law and society a new idea of the state will appear via the continuous adaptation to the radically changed global context, instead of the definitive disintegration of statehood.

vii. World public order

Legal literature traditionally uses the concept of public order *(ordre public)* — especially in the fields of international private and public law, and with reference to human rights questions — to determine the possibility of state intervention into the autonomous legal processes. The justification of such an intervention is based by and large on generally accepted common values of a given state; such are for example morality or public health. In his study Andrea Binachi reconstructs this traditional concept of public order in order to create a fundamental concept of the emerging global law.[59] Binachi claims that the emergence of the doctrine of international human rights has definitively altered the traditional paradigm of public international law.[60] Non-state actors — mainly human beings — have gradually become subjects of international law beside the nation states. Parallel to the development of the human rights doctrine the idea of world public order has gradually emerged. Fundamental and universal values have crystallised in the regime of international law since *erga omnes* norms had been defined through the development of *ius cogens* and the

[58] Jean-Philippe Robé „Multinational Enterprises: …" 46-47. p.

[59] Andrea Binachi „Globalisation of Human Rights: The Role of Non-state Actors" in Global Law Without a State ed by Gunther Teubner (Aldershot, Brookfield USA, Singapore, Sydney: Darmouth 1997) 179-212. p.

[60] Andrea Binachi „Globalisation of Human Rights: …" 182. p.

construction of the international crimes system.[61] Binachi argues that these different legal concepts that are based on a common respect for human rights create the world public order. This universalistic concept is built on certain commonly-shared values —with the human rights doctrine in the centre — and is respected by the whole international community. Thus, world public order can be regarded as a minimum level of protection that has to respected by all actors of the international community. The universalism of these values is based on the globalisation of human rights as primary values via the growth of a transnational civil society.[62] It is obvious, thus, that the idea of the world public order is really eligible to create the quasi-ethical foundations of the new global legal regime.

viii. Maxwell case

The quickly growing complexity of global business affairs can produce a number of unprecedented situations when the national and internationals legal regimes have no adequate answers. In these cases the 'practice' itself has to solve the new problems via constructing such normative 'answers', that fulfil the normative void. The bankruptcy of the Maxwell empire, in 1991, produced a paradigmatic case, that can illustrate how these processes of autonomous law-making have operated on the very special and technical fields of socio-economic procesess. John Flood and Eleni Skordaki present the main question of this insolvency procedure by focusing mainly on the differences of the British and American insolvency regimes.[63] They argue that the Maxwell protocol — produced as a final result of the cooperation between these two diverse insolvency systems — is a special hybrid: it is neither a contract nor an act of legislation, it is a form of private governance.[64] As an example of private governance it is also an example of valid law produced by — partly — 'private orders'. The protocol has swiftly acquired the status of a model, and it could be a 'precedent' for future insolvency procedures when there won't be any rules to govern these enormous, cross-border cases.[65] The example of this protocol and conflict settlement process demonstrated clearly the internal functioning and unique processes of global law.

The above mentioned elements are only the major mosaics of a much more greater picture. After the overview of these rudiments it is possible to reconstruct the image of global law in accordance with its main characteristics reflected in the studies.

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[61] Andrea Binachi „Globalisation of Human Rights: …" 183. p.

[62] Andrea Binachi „Globalisation of Human Rights: …" 203. p.

[63] John Flood and Eleni Skordaki "Normative Bricolage: Informal Rule-making by Accountants and Lawyers in Mega-insolvencies" in in Global Law Without a State ed by Gunther Teubner (Aldershot, Brookfield USA, Singapore, Sydney: Darmouth 1997) 109-131. p.

[64] John Flood and Eleni Skordaki "Normative Bricolage: …" 113. p.

[65] John Flood and Eleni Skordaki "Normative Bricolage: …" 125. p.

IV. Concluding remarks

The reviewer does not feel to be competent enough — due to his young age and relatively "inexperienced" status — to draft an overall evaluation of the above-observed book. Therefore the reader must be contented only with some special remarks.

The volume reflects the general uncertainty concerning the essence of globalisation within social sciences. With respect to the majority of the observed problems the authors did not intend to formulate as exact or definite statements as the greatest classicals of legal and political science — for example Kelsen or Duverger — have done it. But this lack of certainty — if we think about it more thoroughly — is not necessarily a serious deficiency. Moreover, it could be even considered a merit of the book. Through the indication of the terminological, interpretative or other-like difficulties the authors suggest the necessity of self-restriction in scientific attitude. In the age of globalisation the belief in omniscience is not more than a mere — and a little bit ridiculous — illusion. In our age, when the availability of information is much more rich than ever before, the possibility of erring or at least the fact of uncertainty has to be accepted.

The editor and the authors have a consistent conceptual and philosophical background. They primarily applied the concepts and philosophical ideas of Luhman, Habermas, Foucault and Teubner. To sum up, the editorial concept of this volume is based partly on the post-modern results of social sciences and incorporates the political presuppositions of modern liberalism. This alloy of post-modernity and modern liberalism formulates a solid and sure conceptual background and ensures the unity of the authors' attitudes. Furthermore, it proves to be truly practical because the book can represent a unified attitude with solid common points contrary to many other articles or books. Solely one question remains in this respect: stamming from differing streams of thinking, take conservative ideas or the social doctrine of the Catholic church for instance, would it is possible to arrive - at least in the major points — at similar conclusions?

The standard of the publication of the volume by all means befits the highest criteria. The editing seems to be perfect and elegant; there are no misprints in the volume. Lastly, what seems to be one of the most crucial points for the reviewer, each chapter has an impressive system of notes and list of references that can be very useful for any researcher who wishes to further elaborate his insight into either dimension of the emerging global legal system. The volume advocates such high level of intellectual activity that should serve as an example for the young researchers of our posterity to follow.

■ Zoltán Fleck

Architects of democracy*

Sometimes adapting new ideas is as difficult as inventing them. In the area of theory and sociology of law the situation is even more complicated because almost all important issues may concern political values, ideologies or pure individual interests. But one of the most demanding areas in this respect is the sociology of the legal personnel, since the scientific community at least partly belongs also to this group of people. Identities and sensibilities apart, this short essay might serve as a thought-provoking argumentation for using new perspectives in sociological research of the legal system.

In this short essay I intend to show the relevance of the sociological perspective concerning the role of legal professions. There are also valuable historical analogies, but central European new democracies give rich research field.

Since constitutional institutions are still suffering from weak legitimation and pre-democratic cultural background, professional craftsmanship has to have outstanding effects on the skeleton of the rule of law and democracy. Mostly they are the designer, architects of the future building of democracy. The hindrance of this historical role in some cases is the etatist, predemocratic value system as a consequence of the forty years socialization. The aim of this text is to shed some light to a rather neglected field of legal sociology.

Legal professions during social and legal changes

Péter Esterházy in his brilliant essay, arguing on the human hardships of the transformation in Hungary has written: "Everything has been changed only we remained the same." This

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state of affairs has brought about tremendous strains, paradoxes and burdens which post-communist societies must face, and also some unavoidable disappointments which continue even long after the actual events of the peaceful revolution have ceased.[1] The writer here emphasized the personal and social continuity as well as the permanent responsibility for the past, but we cannot be entirely persuaded about the unchanged character of the actors who had made and suffered these transformations. During large-scale changes social actors usually undergo deep changes too, which in turn have transformed the previously altered environment and introduced yet new changes. These circles are sometimes virtuous, sometimes vicious.

The disappointments in Hungary and other post-communist countries over some inherently unrealizable hopes, such as swift economic success and wealth, a more efficient functioning of the welfare institutions, created a new set of barriers to the social, political and legal development, which allowed the sociological literature on the question of trust in the institutions to flourish. As Krygier added, some fulfilled hopes, after a short time turned out to be "ugly": rule of law is not so nice or important term in the popular understanding, than are material justice or equality. The unintended consequences of transformation are now very clear and painful: the huge social inequalities, poverty, atavistic nationalism, anti-Semitism, and populism, an ineffective state and legal system, etc. The societies that broke away from socialism have found themselves in a state of constant flux full of challenges and transformations which are grasped as crises, and produce anomy, decreasing ethical standards both individually and socially.

Some years after the revolutions towards democracy, but before consolidation of the new values (individual rights, minority rights, constitutional barriers) sensitive intellectuals have noticed a decline in the liberal values and practices, this tendency is summarized as the "velvet restoration" or "post-fascism". The rebirth of egalitarianism, collectivism, anti-liberalism, and even anti-intellectualism seems like a central-European evergreen that has never really disappeared. But these features are not completely unknown in the West either, here too there is a general apathy about, and distrust of traditional politics, as well as emerging intolerance toward strangers. Despite these and other detrimental phenomena, western societies seem to remain solid since they work with impersonal institutions backed by strong traditions. However, even the safety in these traditions could not guarantee these developed societies complete immunity from injurious tendencies as we saw in the case of fierce US hysteria, the Italian populist right and other failings. Democratic processes with long cultural traditions can also be influenced although there is always a much stronger hope of recovery. According to Tismaneanu new democracies are extremely vulnerable to upheaval because institutional, moral, and attitudinal corruptions go hand in hand with a new untried form of governance. The peculiarity of this situation is that a corporatist, authoritarian inclination, as well as a revolt against formal institutions and the reinvention of the pre-democratic traditions dominate the political agenda. While people have lost their illusions about democratization most of them would give up their autonomies and liberties for material benefits, and improved social

[1] Martin Krygier, Parables of Hope and Disappointment, East European Constitutional Review 11\3. (2002 summer)

welfare. This constellation serves as good grounds for paternalist and demagogic political forces seeking charismatic figures in politics to take charge. Ethnocentric argumentation, homogenous and vague collectivity against individual freedom and free thinking are not new additions in this region as the irrational, emotional political style, which emphasizes personal qualities, and authority instead of dense and legitimate institutions, and civic virtue. Weak institutionalization makes the lack of constitutional patriotism more serious: the state as a limited agent with constitutional legitimacy has not yet become an accepted figure for the incompetent and corrupt institutional entities which are full of selfish and unreliable politicians and fruitless ideological debates.[2]

According to a recent survey conducted by the author, the prestige of the parliamentary democracy has diminished: parliament as an institution appeared as an ineffective quarrelling branch without considerable power.

Despite the fact that the more or less successful European unification process largely forced institutional changes, the new member states entered the EU with changed societies too.[3] European monitoring procedures and programs, recommendations and official criteria on institutional stability, democracy, rule of law, human rights, protection of minorities focused on institution-building but meanwhile, and in spite of the social tensions, problems of legitimacy, and bad attitudes toward the legal system — these formal measures partly firmed up both the value system and attitudes of the society. Readers might well find two contradictory evaluations of the transformation of the newly emerged democracies behind these argumentations. Studying the role of the legal institutions and professional lawyers inside these institutions I have found it useful to depart from both institutional optimism and cultural pessimism, and refer to a new starting point for sociological research.[4] This is even more important to get rid of the highly political evaluation of a situation that I call *institutional pessimism*. While institutional optimism and cultural pessimism were divergent perspectives of the scientists and western advisors, this new kind of pessimism stems from inside the core of the nation, as a result of the disappointments that continue years after the change to democratic rule. Institutional pessimism means heavy cynicism over the function of the legal and political institutions and a much stronger reliance on such "irrational" forces as fortune, fate, and personal ability. The social basis of this feeling is understandable: as a lesson from past experience a considerable part of the society thinks that law is synonymous with central command, the legal system is a sheer tool of the rulers or the richest strata of the populace, the function of the legal system is to govern, manipulate society, and society should defend itself. Post-communist societies generally (but with huge differences between

[2] Vladimir Tismaneanu, Discomforts of Victory: democracy, liberal values, and nationalism in post-communist Europe, European University Institute, Florence 2002

[3] Stephan Parmentier, Implications of Enlargement for the Rule of Law and Constitutionalism in Post-Communist Legal Orders, draft paper, http://www.iue.it/LAW/Events/WSWorkshopNov2003/Parmentier_paper.pdf

[4] Martin Krygier, Institutional Optimism, Cultural Pessimism and the Rule of Law in Martijn Krygier & Adam Czarnota, eds. *The Rule of Law after Communism. Problems and Practices in East-Central Europe,* Aldershot, Ashgate/Dartmouth, 1999, 77-105

them) lack social trust and trust in institutions. There is a tendency to view the state and legal institutions as the enemy, antipode of the civil society.[5] This is a strong legacy of the dissident thinking of "antipolitics" which had an anti-positivistic meaning in a legal-theoretical sense.

I strongly feel that in order to understand post-communist societies a more complex relationship between institutions and actors must be construed, which is not new in theoretical sociology, but neither is it so widely used in research.

The relation between actors and structures is a highly complex and constantly debated subject in the theory of social sciences. For sociology of law this challenge touches the very essence of the role and effects of law in society. It is beyond the scope of this paper to assess this long theoretical history, and I also omit any discussion on the new lines in institutionalism, both historical and sociological. Nevertheless it is necessary to acknowledge the relevance of this tradition for further analysis. For the moment let us take one elemental lesson from these theories. Following some attempts to adjust the divergent traditions of social science, we should find the connections and mutual effects of actors and institutions.

Ignoring determinism, working institutions generally give the context and environment for the behavior of the human agents and effectively limit the scope of their actions. But actors working with and inside these institutions can also form those institutions during functioning. Take here only one example: judges sitting in the constitutional courts must conform to the institutional barriers to their actions that are designed by the law-maker. However, during their assessment of a case they also have the possibility of defining their own concept of practice and forming an activist, or a more or less restrained position. This kind of defining activity is not peculiarly eastern or central European and can be found everywhere in constitutional systems. But it plays an astounding role in newly established constitutional courts, which have no or few traditions to fall back on. As is well known, institutional frameworks perform a reflexive barrier to inventive human actions. It is true even during formative years, when human creativity plays decisive roles.

Krygier has argued lucidly about the importance of legal traditions, saying that even in hard cases there are legal answers to legal questions, because after principles run out, legal traditions remain considerable.[6] Nonetheless legal traditions are somewhat problematic in societies such as Hungary, Poland or other post-communist nations. Even so, I strongly agree with the evaluation that lawyers, and especially judges are key players in shaping the legal traditions because of their craftsmanship, skills, methods and competence. This legal group has played such an important role, more so than intellectuals have done in general, in creating national traditions in the 19th century: they have invented and formed the constitutional and legal traditions. Starting from the prescriptive nature of the legal tradition, it is necessary to balance

[5] Adam Czarnota: Meaning of Rule of Law in Post-Communist Society. Rechtstheorie, Beiheft 17 (179—196)

[6] Martin Krygier, Thinking Like a Lawyer, in: Wojciech Sadurski (Ed.) Ethical Dimensions of Legal Theory, Rodopi, Amsterdam-Atlanta, GA, 1991

cautiously between preserving and changing these elements while looking closely at the post-communist developments.

"...the past does not merely speak to the present; it prescribes for it. They are institutionalized: transmission of the law is not left to chance but is organized and regulated by institutions of recorders, transmitters and authoritative interpreters."[7]

It is widely accepted in the social sciences, that the new democracies of Europe have more or less successfully changed their political, economic and legal systems. This is a historically unique venture considering the complex program and relatively short time it has taken to implement it. This is also true of the legal system, some parts of which have been transformed completely, sometimes outside, or contrary to, the traditions, while other parts proved to be more problematic, biased or strongly resisted any changes.

During evaluation of the changes and stability throughout the nation, which remains one of the most important theoretical issues of legal sociology, one can differentiate between at least two types of non-changes. Continuities in the legal system in post-communist societies are conservative or progressive according to the openness for such normative (prescriptive) ends as rule of law, constitutionalism, democracy, etc. Among the positive or *progressive continuities* the most general is the basic structure of the civil law system which, in itself, gives many possibilities for planned legal reforms and promises greater success because of the formal-rational character, reliance on codification and rational law-making.[8] Even during the totalitarian regime and later in the context of post-totalitarian socialism, the positivist feature of the legal system, namely the fact that written regulation must be taken into consideration, offered judges relatively safe protection against the sheer demands of the political elite groups. The institutional basis of the legal system was permanently stable following a short revolutionary period when lay elements in the administration of justice and legal education had been put in place The initial communist ideological assumption of laicization had been strongly limited in all east European countries both by dictatorial Stalinism and by the pragmatic post-revolutionary leadership, with some interesting exemptions in East-Germany.[9] During the period of reform, in those countries where reform has been initiated this institutional tradition served as a useful technique for distancing the government from the communist ideology and lawlessness.

Much better known are the *conservative continuities* or structural remnants that thwarted proposed transformations during the course of the "constitutional revolution". We cannot provide an exhaustive list of the structural obstructions to transformation but some of them must be mentioned here.

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[7] s.n. 86. p.

[8] Charles H. Koch: The Advantage of the Civil Law Judicial Design as the Model for Emerging Legal Systems, Indiana Journal of Global Legal Studies, Vol. 11.

[9] Boros László, Fleck Zoltán, Gyulavári Ágnes, Die Beteiligung von Laien an der Rechtspflege im sozialistischen Ungarn, Ius Commune Sonderhefte (Studien zur Europaischen Rechtsgeschichte), Recht im Socialismus Band 2. Justizpolitik, Hrsg: Gerd Bender, Ulrich Falk, Vittorio Klostermann, Frankfurt am Main, 1999, 147-199

Despite some legislative efforts during the first years following transformation, deregulation was only partly successful: the Hungarian legal system remained simultaneously over- and under-regulated, although many low-level decrees were annulled by legislation, and the Constitutional Court also took part of this process as a constitutional selector of the old legal system. But, as usual, large-scale transformation of the economy, building a democratic political environment, and general modernization encouraged greater law-making activity and, as is well known, speed never serves quality and prudence. (As a law-making factory, Hungarian Parliament has often created regulations which were after a short time proved to be useless or have been modified several times. Technical faults made judges mad or severely skeptic about Parliament.) Despite the notable volume of deregulation, the number of legal norms in operation has enourmously expanded.[10]

From the perspective of constitutional stability and progress the effects of the past on society might be more important, since this issue concerns the effectiveness of the legal system through its position in the norms and institutions of the country. Disregarding the remnants of attitudes and outlooks created by the earlier political system — the lack of good manners and decided lack of trust in the authorities — allowance should be made for a particular form of backwardness, for instance the mentality of legal staff, the professions and, especially the judiciary which had been directly involved with the function of state and law under communism.[11] Quoting only one example: judges sitting on the upper courts often use a logic in cases of freedom of the press, which practically ban the critique of officialdom. In the eyes of these judges the hard critic of state institutions and bureaucrats is something abnormal.[12]

[10] Invalidated legal norms in Hungary, 1990-2004

	1990-2000	2000-2004
Act of Parliament	373	259
Governmental decree	1248	1236
Ministerial decree	3187	2810

Legal norms in operation in Hungary, 1990-2004

1. Acts of Parliament

1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
350	425	494	587	670	765	869	983	1054	1027	1148	1240	1299	1264	1381

2. Decree by Government

1990	2004
1214	2237

3. Ministerial decree

1990	2004
2218	3930

[11] Fleck Zoltán, Judicial independence and its environment in Hungary, in: Priban, Young, Roberts (eds.): Systems of Justice in Transformation, Ashgate, Aldershot, 2003

[12] Fleck Zoltán, Freedom of the press in the civil adjudication, in press

As already seen in the European unification process, and also from a broader view of progress, it became clear after some years that the proper application of the results of new legislation is more challenging than creating new rules.[13]

It would be too undemanding to state that human rights, constitutional values, freedoms are not part of the legal culture, and we should not wait for effective working in this respect. Such a statement is pure cultural pessimism, which can be overcome. But there are factual pitfalls, among other things, attached to the creative application of the legal decrees, with the judicial application of the Constitution and constitutional values, and with the wholesale bureaucratic positivism. This is because legal staff have been trained to apply the written law only, and to evade any political interpretation of higher norms or values. At the same time we must be aware of the fact that this peculiarity of the law in Hungary had an important function in self-defence for the judges under communism. Nevertheless the present state is in some respects confusing in the West also, regarding perhaps the evaluation of judges' work, bureaucratic pressures, and the ability of using European case law. In addition to these challenges the new democracies must face up to some new- born misinterpretations, such as that of the independence of the judiciary, by which some magistrates try to use this constitutional value as an ultimate defence against public criticism and as a safeguard against open debates on verdicts.

Because Hungary and some other former communist countries — with different argumentation and causes — did not change the legal personnel, remnants of old attitudes could not be eliminated by simple administrative changes. Even the former GDR, where scrutinizing legal professions was carried out on a large-scale, did not escape completely from the troubles, and the radical solution asked a considerable price as can be seen from a highly sophisticated portrayal of the events.[14] The purging processes after one and a half decades are not on the scene, but waiting for a generation shift seems also to be a misleading tactic. Evading the fashionable institutional pessimism I think that the implementation of some new techniques of formal education for the professionals is not the only valuable result of the earlier decade, but it is the legal institutional environment itself that creates — albeit slowly — the proper functioning. When properly established, institutions are able to breed well functioning actors. We must go much further in praising the results than the line of reasoning indicated below.

"Administrative and court reform was not very successful during the first decade of transition. Much time and money was invested with disappointing results overall. However, there are reasons for hoping that investment was not altogether lost. Both the EU and the candidate countries have gained considerable experience in how and how not to promote this reform effectively."[15]

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[13] Frank Emmert, Administrative and Court Reform in Central and Eastern Europe, European Law Journal, Vol. 9. No. 3. pp. 288-315. According to a recent survey Hungarian judges practically do not refer to European Court's decisions. (Fundamentum, 2005/2.)

[14] Inga Markovits, Imperfect Justice: An East-West German Diary, Oxford: Clarendon Press, 1995

[15] Emmert, p. 315.

The question of how to ensure the conformity of the legal practitioners, particularly in times of radical political transformations is not new in the history.[16] A newborn political regime (following sharp political-ideological swings) ordinarily had to redefine its relationship to the legal staff. (In the German instance there were at least four good examples of this kind of recasting.) Because bringing in new laws and even introducing an extensive normative change is rarely sufficient to bring lawyers in line with the regime, alternative measures usually have to be established for ensuring conformity. According to Hubert Rottleuthner's enumeration the arsenal ranges from legal education to disciplinary sanctions. Among the tremendous changes in central European legal systems, some are really suitable for strengthening conformity, but one should also take into account the innate ability of the continental judiciary of being able to conform to any regimes.

As for legal training, the autonomy of the universities following democratization increased in importance, as did the law degree, thanks to the growing need for lawyers in a market economy and democracy. Instead of the state controlling entry to the study of law, faculties began to open their doors to ever increasing numbers of students and, consequently, to increasing amounts of money. Under communism less than a thousand qualified lawyers graduated from universities annually, because strict state regulation maximized the possible number of students. Following the system-change the social need for lawyers has grown sharply, the number of law students in Hungary by the year 2002/2003 almost reached an unprecedented 18.000. In addition to the radical changes in the regulation of professions, the emergence of market pressures had the most significant overall structural effects on the legal occupations.

The autonomy of legal science departments at the universities also became limitless, as they continued in their tradition of doing nothing much more than complain about low wages, in the meantime seeking other more lucrative employment. In Hungary the actual decisions on recruitment of personnel, the career and remuneration of judges, as one of the most important tools in ensuring conformity with the radical reforms, were given to the administrative elite of the judiciary. Thus the higher courts and their presidents have strong possibilities of influencing lower ranking judges as well as carrying out judicial practice without effective external control. This situation has corrupted the selection of judges and made a new kind of contra- or biased selection.[17] Not only are formulas, informal binding opinions, legal and ethical measures, appellate or review instances the tools for guaranteeing conformity, but through these, guaranteeing the career expectations of lower ranking judges.

This last example illustrates that institutions matter; the necessity of preserving the institutionalist view is very clear.

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[16] Hubert Rottleuthner, The Conformity of the Legal Staff, in: Karlsson, Jonsson, Brynjarsdottir (eds.), Recht, Gerechtigkeit und der Staat, Duncker & Humblot, Reykjavik, 1993

[17] Badó Attila, Hungarian Lawyers in the Making: Selection Distortion after the Democratic Changes in Hungary (manuscript)

Players, actors, roles: lawyers as active agents

Even from the middle of rapid changes in numerous spheres, one can notice the worldwide transformations of legal professions during the last decades. For those societies that actively changed their political, economic and legal systems, these more general transformations created the background and the context, and it is evident that the adjustment to a changing environment generates new challenges during the process of transformation. Despite the stability of the final values of these transformations (rule of law, rights, democratic way of doing things, etc.), the routes to these aims, and the institutions that could encourage the ultimate success are extremely shaky.

The intensive work carried out in building institutions in the post-communist countries lends considerable significance to pragmatic advisors, legislatures and other designers but little effort has been given to a deeper understanding and analyses of the real activities of the actors involved in these processes. From a legal sociological aspect the highly important players are those in the legal professions who not only helped to create new, or renovate old, institutions, but continue to recreate them in their everyday functioning.

From our perspective the most important roles in the legal system are those which shape the institutional activity of the legal system. Judges, prosecutors, even private attorneys in a system of justice, law professors, academics in legal education, in constitutional court or working as ombudsmen, administrators, bureaucrats creating legal measures and administering legal issues.

Periods of rapid change are rarely advantageous for analysis, but we can safely assume that some deeper scientific research would be very fitting in this case. This research should bravely cross the disciplinary limits using different social sciences (history, social history, legal sociology, jurisprudence). The frame of scientific conceptualization of legal issues should extend traditional limits. This kind of trespass needs brevity and enterprise, although cross-bordering is by no means new in the social sciences. Understanding the legal professions sociologically needs this shift in perspective, especially in the case of societies under the pressure of huge changes. As an evaluative summary of the traditional aspects of legal science one can accept Terence Halliday's argumentation:

"Both social sciences and academic lawyers have directed much greater attention to the recruitment of lawyers, legal education, professional organization, and stratification of the profession than to its work and its wider institutional impact. Seldom do scholars treat lawyers as principals or agents of institutional design, constructing and maintaining general market institutions, state power, or civil society."[18]

Of course there is no space here to run through the roots and results of the cross-disciplinary project, we can only give a brief account, with some possible research topics.

[18] Terence C. Halliday, Lawyers as Institution Builders: Constructing Markets, States, Civil Society, and Community, in: Sarat, Constable, Engel, Hans, Lawrence (eds.) Crossing Boundaries. Traditions and Transformations in Law and Society Research, Northwestern University Press, Evanston, 1998, p. 244.

This fresh line, which assimilates various aspects from history and sociology, assumes the active role of lawyers, it conceptualizes them as agents, not only mirroring the peculiarities of society, economy or state, but constituting the institutions in which they are embedded.

In the field of sociology of lawyers such issues as how lawyers control the market and with what measures they can reach competitive advantages in a free market has taken a dominant position and reached its peak in Richard Abel's monumental works.[19] The problems of market behavior, the control over training and admission to the professions, the role of the state in regulating working conditions were certainly decisive at the moment of transformation of the state in to the new democracies. But it should be more challenging to investigate the market-creation process, while lawyers are playing fundamental roles in designing market institutions, forming the non-economic foundations of economic activity. They consistently do their jobs in the interests of capital or big business by finding new paths for their clients, constituting new forms of commodity exchange, insurances, etc. They are the inventors of institutions and "symbol traders": "Lawyers invent relationships. This is their special skill, their indispensable contribution to capital."[20]

So the market as a relatively new force in the old Eastern Bloc does not only change the setting of the professional work, as one can see, for example, in the case of the attorneys who must face strong market competition after years of security made by a numerus clausus. At the end of the 1980's there were about 2000 practicing attorneys in Hungary, a decade later there were no less than 8000. This enormous growth of lawyers, and the huge increase in students following a legal education is symptomatic of all the new democracies in Central Europe.[21] As a consequence of the "privatization" of this profession after some decades of exclusivity ensured by the state, and due to the strengthened market pressure, attorneys are widely differentiated. Additionally they have had to face the big law and counseling firms of the West that could now enter this new, unregulated market. But lawyers are by no means only pure victims of the market-economy, they have proved to be successful in gathering competitive advantages while themselves creating the conditions. The market is created by lawyers in different ways: during the first years of the transformation (and in Hungary even some years before the political change) they were reformist advisers of the legislator, even advising in the political role of deputies or chief bureaucrats. The privatization of the state property after some years of spontaneity (spontaneity was an euphemistic, but widely used concept on the unregulated, sometimes anarchistic events) and other types of economic regulations, brought about a set of creations and some new market subjects and jurisdictions, new definitions of the legal practitioner, subject (corporation), inventing a new kind of economic citizenship. It is highly important and decisive that the economic reform regulation, which created most of the market players by constructing a new kind

[19] Richard L. Abel, Philip S. C. Lewis, Lawyers in Society, Vol. 1-3., University of California Press, Berkeley, 1988-89

[20] Maureen Cain, The symbol traders, in: Cain, Harrington (eds.) Lawyers in a Postmodern World, Open University Press, Buckingham, 1994, p. 33.

[21] Erhard Blankenburgh et al., Legal Culture in Five Central European Countries, WRR, The Hague, 2000

of economic legal personality, took place before the system-change and this fact also gave strong dynamism to other legal transformations. After the first democratic election in Hungary, but also elsewhere, the Constitutional Court arrived on the scene as a chief designer and tried to reshape the social rights of the citizens, amongst other things. This activity sometimes seriously hindered the further reforms of the hereditary sickness of such institutions as the welfare system. This logic was openly present in the fate of the welfare reform in Hungary: in 1995 Constitutional Court declared unconstitutional the cutbacks of the socialist welfare system.[22]

During the reform, and through the creation of the new market institutions, lawyers also reshaped the market morality, they constructed some relevant concepts, such as dirty money, money laundering, corruption; this adventure seems very dubious and risky because these concepts are strongly value-burdened. Even so, this creativity touched the legitimacy of the new system and gave legal forms to capitalism.

As for the role and function of the state in the legal profession, it is widely known that in Europe and mostly in the continental civil law world, professionalization was guided by government, states intervened strongly and circumscribed the conditions of lawyer's work. The latecomers of Central- and Eastern Europe have experienced all the burdens of this type of state activity: the sometimes brutal force of the modernizers. It cannot be denied that lawyers under totalitarianism served as mere servants of state interest, and sometimes even as protagonists of the state ideology. But it should be clear that in those systems, and especially under socialism, lawyers played a limited role, their work as channeling and transforming central requirements was simply unimportant, while central command had a direct effect on society, at least theoretically. This also means that when the command economy was forced to reform from the end of the 1960's, the lawyers' role turned out to be more important because indirect regulation of the economy did not mean liberalization only, but regulation through legal means. This demanded the attention of well-educated lawyers during the creation and realization of legal regulations.

In the course of creating a moderate (limited) state, defining citizens rights, the writing of a constitution, lawyers in their role as participants of the round-table talks effectively formed the shape of the new democracies, continuing the long tradition of reformist "political lawyering" or lawyers' participation in high politics. In fact, central European transformations were largely concluded through constitutional measures and this feature gave the processes a peaceful, smooth character. The important contribution of lawyers in this process should also be recognized. Along with all compromises and faults, revolutionary law-making surely makes mistakes. In everyday practice different law professionals create and recreate legitimacy for the state and rule of law, from this perspective a judge or a prosecutor becomes inevitable state-stabilizers.

In forming market institutions lawyers have the function of giving rational legitimacy to private interests, since they — in post-socialist countries — have become defenders of individual interests after long decades of working under official

[22] András Sajó, Socialist welfare schemes and constitutional adjudication in Hungary, in J. Priban and J Young (eds.), The Rule of Law in Central Europe, Ashgate, 160-78.

communitarianism. (or at least under such a system where privatism was politically illegitimate). In influencing state affairs lawyers have the duty to form democratic "rules of the game" and, even far more complicated, making the new democratic rules a natural element of social life. Their firm responsibility is to form a constitutional culture. Instead of complaining about the lack of this cultural background the law profession must design constitutional and legal values and legitimize them.

But it is well known that to ensure the stability of these structures some social preconditions are necessary, the most general concept of these is civil society itself.

In the sociology of lawyers the trendy view in recruitment to the legal fields has been set in a traditional class perspective, in which lay the social position of law professionals and its consequences. Inequality during recruitment and the level of meritocracy were the central issues. This research perspective should be continued: today the inner conservatism of lawyers, the structural isomorphism of the ruling class or dominant strata and professions continue to leave room for investigation. The social background of lawyers nowadays is a far more vital topic since different kinds of capital and their fruitful exchanges have proved to be important regulators of the social composition of various professions. Students from lower status families are at a disadvantage when attempting to reach the most prosperous careers. This kind of inequality, despite the official positive discrimination in the socialist period, and despite the democratic rush toward meritocracy in a democratic setting, remains unbroken. What is new is the relatively high salaries of the non-market legal professions (that do not compare with their Western colleagues), such as the judge and prosecutor, which are highly valued symbolically following the transformation to democracy, and some years later this position has been turned to financial advantages. Thus, beside the growing pressure on the market of the professionals, the regulation of judges' careers became one of the most disputed and problematic tasks from a sociological perspective. This was largely due to the administrative elite retaining authority for this issue by keeping to its autonomous administration of the judiciary.

In addition to this view, a much more dynamic relationship has also emerged, where lawyers' participation in creating civility, and a civil society is a relevant task. Lawyers play a variety of relevant roles in the reconstruction of civil society in the new democracies, not only in connection with their own professional associations, assemblies, trade-unions, but attorneys are strongly involved de jure and de facto in every voluntary association.

Some historical investigations have shown that in France, before the Revolution, attorneys, sometimes in collaboration with judges, took part in the formation of an autonomous public, in redefinition of the sovereign authority based over the general public. Across the 18th century, lawyers as the voice of the nation effectively monopolized the language of rights and followed symbolic struggles against absolutism.[23]

[23] David A. Bell, Lawyers and Citizens, The making of a political elite in old regime France. Oxford University Press, New York, Oxford, 1994, Lucien Karpik, Lawyers and Politics in France, 1814-1950: the state, the market, and the public, Law and Social Inquiry, Vol. 13. No. 4. pp. 707-736.

During the highly important and formative round-table talks in central-Europe, attorneys' roles were decisive since they effectively shaped the agenda of the talks and formed the language of political argumentation. Without the involvement of lawyers, attorneys and legal scientists alike the "revolution" would not have become legally driven and peacefully constitutional. By creating the formal legal environment of legislative acts and legalistic argumentation and by articulating the language behind this, they created the solid base for constitutional legitimacy. However natural rights discourse is also incorporated into the constitutions, and it did not lose its anti-formalist, anti-positivist edge that was such an important weapon in the hands of dissidents arguing for ethical progress.[24] After consolidation of the legal system "natural law infection" as a political approach serves the populists more as a basis of the criticisms of rigid, technocratic formal law.

The task in forming legal tradition by shaping institutions and discourse is well known, but poorly implemented in the sociology of lawyers as the function of diffusion of values and concepts stemming from constitutionality, rule of law and rights. The discourse of rights and liberalism, the logic of opposing the state with the help of individual rights revealing of pre-revolutionary France was missing in Germany, where lawyers defined their calling (Beruf) in institutionalizing procedures and Rechtsstaat.[25] In Central Europe intellectuals had always played crucial roles in social changes as enlightened or revolutionary substitutions of the bourgeoisie. When politics turned to strong feudal conservatism as in the interwar period, this role faded before a new wave of modernization. Such oscillations strongly touched upon lawyers in their professional roles, but the strongest impact was that of state-socialism with its anti-legalist ideology to begin with, coupled with its ongoing hypocrisy.

It is reasonable to assume that through post-communist transformations, following many years of restricted importance, Hungarian lawyers had to accept both challenges: positing themselves somewhere between the French (strong emphasis on individual rights as defense against state authority) and German (more energy into forming strict legal procedures, strengthening rational bureaucracy) models. Law-makers widely transformed the written law in the interests of a market economy and the rule of law. The judges, in their highly complex situation, guarded the rights of individuals, ensured the stability of civil relations, and strengthened the legitimacy of the legal way of handling disputes. Attorneys as liberal advocates, among others, identified themselves with the interests of the clients and thus legalized social wants. But every legal professional stressed the legal formalism, underlined the limits of state action, and gave importance to legal tools in general. Before the transformation to rule of law, dissidents' argumentation in central Europe emphasized civic virtue and moral authority against communist rule: in their minds the law should be used as a value-burdened political tool in favor of the oppressed. But this morally valuable activity could not be expected from professional lawyers because of their organizational

[24] Jirí Pribán, The Concept of Legality and Legitimation Demands in the Post-Communist Czech Society, in: Febbrajo, Nelken, Olgiati (eds.) Social Processes and Patterns of Legal Control, European Yearbook in the Sociology of Law, Giuffrè, Milano, 2001

[25] Kenneth F. Ledford, From General Estate to Special Interest: German Lawyers, 1878-1933, New York, Cambridge University Press, 1996

bonds, educational biases and ideological constraints; only dissidents standing outside official placements might be vulnerable to this call. From this perspective the new system is far less heroic.

The task of lawyers to settle disputes and encourage consensus forces them to share the responsibility of a developing community. It is not only a Durkheimian logic on professional communities as social integrators but an empirical experience also in family disputes, small-claim personal suits, and on the political, cultural activities of lawyers in small towns as local experts. This latter activity extends the strict limits of "lawyering".

In societies where the autonomy of voluntary associations based on the interests of professional groups was forbidden for very many years, the shift toward community-like control of the corporate boundaries is demanding. Nevertheless different new challenges have emerged: in the case of attorneys market pressure has grown enormously, judges must face heavy work-loads and need to agitate for salary increases, but in this case the associational life and strength has remained underdeveloped.

While attorneys were able to shape some aspects of the market institutions themselves during the transformation and, with the help of some political capital, they could stand up for their individual interests. Judges and prosecutors are not in positions to articulate their needs individually. These public officers are forced to remain aloof from political argument, only the administrative elite is permitted to speak about professional interests. Nevertheless, the issue of salary is highly politicized, although it remains in the hands of official representatives only. A third way of defending personal interests was chosen by public notaries, they successfully lobbied for strong legal restrictions on admission, thus their offices can be obtained only on a hereditary basis, they have managed to ensure that they can evade all competition.

Every professional association must cope with a new situation in which the state cannot automatically defend their interests, concurrence appeared and conquered authority and clients, public voices openly criticize professional activities, divergent interests questioned the cohesion of community.

Despite the tremendous changes that must be undertaken by the legal professions without the advantage of comprehensive sociological research, a more dynamic account should be of value in completing the scene of the sociology of lawyers in which professionals are active agents. Lawyers now have a particular understanding of the formative years of the new democracies as they work at institution-building activities, when they are creating and upholding not only formal structures, but also institutions. They are effectively taking part in value-formation, socialization, and a set of activities concerning civil society and community in a wider sense.

Social engineering as a realistic image of lawyers' tasks can clearly be seen in an age of massive change. Our time is without doubt suitable for placing significant questions before legal professionals, since they are key players in a set of social changes worldwide and in the post-communist countries in particular. Unfortunately we are far from being rich in empirical sociological research, however the theoretical shift that could help in these investigations took place during the last decade. It is, of course, true that cross-disciplinary researches, which should be used in this case, are among the most complex and time-consuming scientific activities. Here I intended to sign the relevance of this kind of research quoting only some elements of a possible, hopefully comparative, investigation.

■ **József Szabadfalvi***

The Elements of Sociological Aspect in the Hungarian Legal Thinking until Mid-Twentieth Century

When we describe the Hungarian traditions of legal thinking, we generally emphasize two remarks.[1] Firstly, as a characteristic

* Professor of Law, University of Miskolc and University of Debrecen, Faculty of Law. Email: jogszabi@gold.uni-miskolc.hu

[1] See from the literature on the subject of history of Hungarian jurisprudence: Somló, B., 'Die neuere ungarische Rechtsphilosophie', in *Archiv für Rechts- und Wirtschaftsphilosophie,* 1, 1907-08, 315-323; Finkey, F., *A tételes jog alapelvei és vezéreszméi* [Principles and ideas of positive law], Budapest, 1908; Horváth, B., 'Die ungarishe Rechtsphilosophie', in *Archiv für Rechts- und Wirtschaftsphilosophie,* 24, 1930, 37-85; Moór, Gy., 'Was ist Rechtsphilosophie?', in *Archiv für Rechts- und Sozialphilosophie,* 36 (1943) 3-49; Szabó, Imre, *A burzsoá állam- és jogbölcselet Magyarországon* [The bourgeois philosophy of state and law in Hungary], Budapest, 1955; Hanák, T., *Az elfelejtett reneszánsz. A magyar filozófiai gondolkodás századunk első felében* [The forgotten renaissance. Hungarian philosophical thinking in the first half of our century], Bern, 1981; Szilágy, P., 'Fejezetek az ELTE Állam- és Jogelméleti Tanszékének történetéből' [Chapters from history of ELTE's department of theory of law], in *Acta Facultatis Politico-Iuridicae Universitatis Scientiarum Budapestiensis de Rolando Eötvös Nominatae,* Tomus XXVI, Budapest, 1984, 105-153; Samu, M. – Szilágyi, P., 'Az állam- és jogelmélet oktatásának története egyetemünkön' [Teaching history of theory of state and law in our university], in Horváth, P. (ed.), *Az Állam- és Jogtudományi Kar szerepe a magyar jogtudomány fejlődésében,* Budapest, 1985, 313-392; Loss, S.– Szabadfalvi, J. – Szabó, M. – H. Szilágyi, I. – Ződi, ZS., *Portrévázlatok a magyar jogbölcseleti gondolkodás történetéből* [Portrays from the history of legal philosophy in Hungary], Miskolc, 1995; Perecz, L., 'A belátásos elmélettől a mezőelméletig. A magyar jogfilozófia fél évszázada: Pikler, Somló, Moór, Horváth' [From the theory of discretion to the theory of law field. Half century of hungarian legal philosophy: Pikler, Somló, Moór, Horváth] in Századvég, 1998, 10, 73-94; Szabadfalvi, J., *Jogbölcseleti hagyományok* [Traditions of legal philosophy], Debrecen, 1999; Szabadfalvi, J., 'Transition and Tradition. Can Hungarian traditions of legal philosophy contribute to legal transition?', in *Rechtstheorie,* 1999, Beiheft 20, 1-19.; Szilágyi, P., 'Jogbölcselet' [Legal philosophy], in *Magyarország a XX. században.* V. köt., ed. István Kollega Tarsoly, Szekszárd, 2000, 39-47.; Szilágy, p., 'Magyar jogbölcselet' [Hungarian legal philosophy], in Gergyely — Izsák (ed.), A magyar államiság ezer éve, Budapest, 2001, 257-270; Szabadfalvi, J., *A cselekvőségi elmélettől az újrealizmusig* [From the theory of activity to neo-realistic], Budapest, 2004.

feature deriving from the geographical conditions and historical-cultural ties of Hungary, the adaptation and interpretation of the achievement of Austrian and German jurisprudence are to be mentioned. Secondly, the dual nature of the legal thinking of this region of Europe is stressed, which comprises a tendency towards legal conservatism and an uptodate interpretation of the most current legal philosophical trends. The most outstanding Hungarian lawyers have been characterized by the latter specific feature.

The mid-1980s signalled the revival of Hungarian legal traditions. By this time the Soviet type Marxism has lost ground in legal literature. Further confirmation of the previously unquestionable paradigms have not put researchers' existence into risk any longer. For jurists concerned with legal theory, it was only a choice of values to decide which paradigm would be fundamental for them. One of the forms of finding new ways was provided by studies in Hungarian traditions of legal thinking before the year of change, which were carried out by the concerned researchers still alive and the younger generations who view this kind of tradition as a neglected value and take responsibility for the rehabilitation of their predeccessors' work.

Three great periods–natural law, legal positivism and Neo-Kantianism–are to be distinguished in the history of legal philosophy in Hungary up to the mid-twentieth century, mostly following the traditions of legal thinking in Europe. The attitude of legal positivism came into full power in the Hungarian literature of jurisprudence with the work of Ágost Pulszky (1846–1901) in the last decades of the 19th century.[2] In his early works Pulszky was mainly concerned with the theories of More, Bacon, Hobbes and Locke, the classical representatives of English social philosophy. Later in his career Pulszky focused on the ethnological attitude represented by Lubbock, Waitz, McLennan, Tylor, Morgan and Maine. In 1875 Pulszky completed the translation of Henry Maine's *Ancient Law.* He also attached—similarly to his contemporary, Friedrick Pollock[3]—over a hundred-page notes of their own scientific value to Maine's work.[4] Afterwards he wrote a critical review of Herbert Spencer's philosophy, who was considered as innovator of the contemporary social scientific thinking. His major work titled *The Theory of Civil Law and Society* was published in Hungarian in 1885, and in English in 1888.[5] Inspite of a favourable reaction to his work, he was not able to achieve his main goal, i.e. to enter and be accepted in the English scientific public life. However, Pulszky's work, according to Hungarian legal philosophy, is still

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[2] Pulszky's main works of jurisprudence: *A római jog, s az újabbkori jogfejlődés* [Roman law and moder legal development], Pest, 1869; 'Az angol jogbölcselet történetéhez' [On history of english legal philosophy], in *Budapesti Szemle,* 1875, 126-148; *A jog és állambölcsészet alaptanai* [The fundamental doctrine of philosophy of law and state], Budapest, 1885; *A jog és állambölcsészet feladatai* [The tasks of philosophy of law and state], Budapest, 1888.

[3] Pollock, F., *Introduction and Notes to Sir Henry Maine's Ancient Law,* London, 1908.

[4] Maine, H., *A jog őskora, összeköttetése a társadalom alakulásának történetével, s viszonya az újkori eszmékhez* [Ancient law, its connections with the early history of society and its relation to modern ideas], (A Magyar Tudományos Akadémia megbízásából fordította, bevezette és jegyzetekkel kísérte Pulszky Ágost [Ágost Pulszky translated, wrote introduction and notes on Hungarian Academy of Sciences's authority]), Budapest, 1875.

[5] Pulszky, Á., *The Theory of Civil Law and Society,* London, 1888.

fundamental, since the publication of this book laid the cornerstone of legal positivism in Hungary. In his work Pulszky considered Maine's comparative-historical attitude and his theoretical theses were based on Spencer's ideas.

Pulszky's achievement is considered a milestone in Hungarian scientific life, since his major work established ground for legal positivism in Hungary. In his positivist view he accepted 'life interest', determining the idea of evolution, as a driving force as well as 'theory of activity' reflecting the classical liberal attitude to law, which claims that the greatest individual freedom, 'possibility for acting' is to be ensured by the state and law. Pulszky in due time realised the importance of social, economic and political changes at the end of the 19th century, and also their role in the scope of the activity of state. In his view, the increasing role of state was mostly apparent in the changes of economic conditions, in social policy and health service. Clearly perceiving tendencies in the development of contemporary capitalism, he outlined the idea of early social state beyond the classical liberal theoretical trend. He also paid attention to the conflict of nationalities beyond the boundaries of contemporary state. His work has influenced several branches of social science, in this way Pulszky's oeuvre is recognised not only by philosophy of law but by theory of state, politics and sociology as well. From the end of 1880s his active political role turned him away from science therefore his life-work is considered incomplete. Outstanding representatives of Hungarian progress after the turn of the century were among his students, for example Gyula Pikler and Bódog Somló, who later accomplished significant works of legal philosophy and Oszkár Jászi—politician and scientist—who, as bourgeois radicalists, were fighting for a new, modern, 20th-century Hungary devoid of any feudal constraints. They believed that a wide scope of social, political and legal modernisation can base the establishment of a Western-European model of evolution.

The positivist doctrine reached the peak of its history in Hungary with the work of Gyula Pikler (1864–1937) at the turn of the century.[6] In his early works Pikler devoted attention to the inner contradictions of Spencer's theory against the intervention of state. Pikler did not consider Spencer's classical liberal attitude, which was based on biological conceptions as acceptable, and he emphasized the need for increased state intervention for the sake of society. Pikler's later works are all characterized by a discussion with Spencer whose theories he, on one hand, analyses for the support of his own theories, but on the other hand, he criticises and evaluates them. Spencer's influence is revealed in his theory of the evolution of law, or in his theory of 'discretion'. He believes that people act not by instincts but by purposeful discretion, and according to this, people realise and develop norms and institutions satisfying their needs more and more perfectly. In this way people establish society, institutions and law which are considered rational and purposeful by them. The first ones, who recognise purposeful discretion, are the most outstanding members of a society, the so called educated classes. From the 1910s Pikler was mainly concerned with biological and psychological reasons behind the phenomena of society. Consequently, he became estranged

[6] Pikler's main works of jurisprudence: *Bevezető a jogbölcseletbe* [Introduction to philosophy of law], Budapest, 1892; *Az emberi egyesületek és különösen az állam keletkezése és fejlődése* [The origin and development of state in particular], Budapest, 1897; *A jog keletkezéséről és fejlődéséről* [About the origin and development of law], Budapest, 1897.

from questions of law and legal philosophy, and while changing his field of interest in science, he carried out experiments in psychophysics and sense physiology.

At the turn of the 20th-century Bódog Somló[7] (1871-1920) is the most reputable representative of Hungarian legal philosophy whose oeuvre greatly contributed to the development of the Neo-Kantian legal philosophy, the dominant trend prevailing in Central Europe et the time, a development that eventually resulted in modernisting the legal scholarship and theoretical thought in law in Hungary. Somló is a classic authority of social theorising in Hungary. His professional activity, relatively limited in time, spanning about a quarter of a century, can be divided into two phases.

The first period of activity is characterised by the unconditioned acceptance and re-assertion of Spencer's doctrines, concomitant with personal adherence to his one-time professor Gyula Pikler's theoretical approach based on natural science and psychology within the framework of a slightly materialist version of the philosophy of history. In co-operation and co-authoring with Pikler,[8] Somló focused his attention mainly on sociological problems taken from a naturalistic perspective. During this period Somló became–together with Ágost Pulszky and Gyula Pikler–the third outstanding figure determining the future of sociological positivist philosophy of law in Hungary.

The second phase of Somló's scholarly career is defined by his Neo-Kantian turn, heralding maybe the most prosperous period that has ever existed in Hungarian legal philosophy which–reprezented mostly by his successor, Gyula Moór and, later, the renown legal sociologist Barna Horváth–lasted until World War Two, when the Soviet military occupation replaced local traditions with 'Soviet-type' Marxist theory as an all-substitutive panacea. Despite that for early Somló legal philosophy and legal sociology were equal instanding, his Neo-Kantian conceptualisation led to revision and separation of these inter-connnected areas of legal inquiry. The outcome of this period founded and substantianed Somló's scholarly reputation in legal philosophy in Hungary and especially in German-speaking territories. Nowadays he is duly regarded as a classic authority of Neo-Kantian philosophising on law in Central Europe, among thinkers like Rudolf Stammler, Gustav Radbruch, Hans Kelsen and Alfred Verdross.

In his writings published around the turn of the century, he criticised the scholarly ideals established by his contemporaries, from the perspective of natural-science-inspired positivism and evolutionism. His positivist theoretical outlook was all the way through complemented by scholarly interest and personal involvement in public affairs. One of his major works characteristic of this period is the book-size treatise

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[7] Somló's main works of jurisprudence: *Állami beavatkozás és individualizmus* [State intervention and individualism] Budapest, 1900; *Jogbölcseleti előadások* [Lectures in legal philosophy] Kolozsvár, 1906; 'Masstäbe zur Bewertung des Rechts', in *Archiv für Rechts- und Wirtschaftsphilosophie,* 3 (1909-10) 508-522; 'A jog értékmérői' [Value standards of law], in *Huszadik Század,* 11 (1910) 1-14; 'Das Wertproblem', in *Zeitschrift für die Philosophie und philosophische Kritik,* (1912) 66-95; 'A szokásjog' [Customary law], in *Farkas Lajos emlékkönyv,* Kolozsvár, 1914, 339-369; *A helyes jog elméletéről* [On the theory of right-law theory] Kolozsvár 1914; *Juristische Grundlehre,* Leipzig, 1917. [2. ed: 1927, and reprinted: 1973]; *Jogbölcsészet* [Legal philosophy] Budapest, 1920.

[8] Pikler – Somló, *Der Ursprung des Totemismus: Ein Beitrag zur materialistischen Geschichtstheorie,* Berlin, 1900.

on *Állami beavatkozás és individualizmus* [State intervention and individualism] published in 1900. The greater role the state was to play and the formation of monopol capitalism both demanded reformulation and adaptation of the respective roles and institutions of law, state and politics.

From the early 1930s, in the prevailing Neo-Kantian philosophy Barna Horváth[9] (1896-1973) created a new colour in the Hungarian traditions of legal philosophy. In his view of legal theory, which he preferred calling legal sociology or even 'pure legal sociology' according to Hans Kelsen's terminology, his originality was mainly revealed in his so called synoptic attitude and the functionally related processional legal view. He has created something new by conforming two paradigms that were considered antagonistic in contemporary legal philosophy. A parrallel existence of Neo-Kantian (Lask, Rickert, Verdross, Kelsen, etc.) and pragmatic-empirical attitudes (Pound, American realism, psychologism, etc.) and their relation to each other was regarded as a breakthorough not only in Hungarian but also in European legal thinking. The consideration of these two influential paradigms is not by chance. While between the two World Wars Neo-Kantian paradigm is to be considered evident in Middle Europe, pragmatism appeared as a new idea mainly in the Hungarian public view of legal philosophy. Horváth's susceptibility to empirism can be attributed to two reasons. On one hand, he as practising lawyer realised contradictions in norms and reality, which was neglected by Neo-Kantian philosophy. On the other hand, during his journey to England in the late 1920s, Anglo-Saxon legal culture made a great impact on him. His connection with Leonard Hobhouse, English sociologist, and Moris Ginsberg, his student, influenced the elaboration of his procedural legal attitude since Horváth adapted from their views the division of four types of social evolution. After coming home from England, Horváth reported in a number of papers on the achievements of both American and English jurisprudence. The experiences and impressions he gained in England urged him to complete the history of English legal philosophy.

The synoptic method elaborated by Horváth is an original interpretation of one of the fundamental questions of Neo-Kantian legal philosophy, namely the connection between value and reality. The most significant representatives of 'contemporary' Hungarian philosophy of law, including Moór, Somló and Horváth, all concerned themselves with finding a solution to this problem. Horváth's starting point was the essence of legal activity, and considered law as a pattern of thoughts in a judge's

[9] Horváth's main works of jurisprudence: 'Die Idee der Gerechtigkeit', in *Zeitschrift für öffentliches Recht,* 7, 1928, 508-544; 'Természetjog és pozitivizmus' [Natural law and legal positivism], in *Társadalomtudomány,* 8, 1928, 212-247; 'Gerechtigkeit und Wahrheit', in *Internationale Zeitschrift für Theorie des Rechts,* 4, 1929, 1-54; 'Die Gerechtigkeitslehre der Vorsokratiker', in *Studi Filosofico-Giuridici dedicati a Giorgo Del Vecchio,* Modena, 1930, 336-372; *Die Gerechtigkeitslehre des Aristoteles,* Szeged, 1931; 'Hegel und das Recht', in *Zeitschrift für öffentliches Recht,* 12, 1932, 52-89; *Bevezetés a jogtudományba* [Introduction to jurisprudence], Szeged, 1932; *Rechtssoziologie. Probleme des Geselschaftslehre und der Geschichtslehre des Recht,* Berlin-Grunewald, 1934; 'Sociologie juridique et Théorie Processuelle du droit', in *Archives de Philosophie du droit et de Sociologie Juridique,* 5, 1935, 181-242; *A jogelmélet vázlata* [Sketch of legal theory], Szeged, 1937; 'Der Sinn der Utopie', in *Zeitschrift für öffentliches Recht,* 20, 1940, 198-230; 'Prolegomena zur Soziologie', in *Archiv für Rechts- und Sozialphilosophie,* 37, 1943, 50-67; *Angol jogelmélet* [English legal theory], Budapest, 1943.

mind, which is nothing else in this way but a 'reflexive theoretical product'. The procedure by a lawyer becomes synoptic through his applying a legal case to a legal norm, and at the same time, vica versa, relating a legal norm to a legal case. The lawyer, therefore, relates normative matters of fact to real matters of fact. In order to do this job, the lawyer needs a knowledge of facts selected according to legal rules, and also a knowledge of laws selected according to matters of fact. While a practising lawyer focuses his attention mainly on a legal case, a theoretical lawyer concentrates on statutes of law, but both consider the legal case and the law at the same time.

According to Horváth's processional legal attitude, closely related to his synoptic method, law cannot simply be regarded as norm but as an abstract behaviourial pattern and relating actual behaviour, or in other words, a connection between norm and behaviour, which is the procedure itself. Procedure is the 'genus proximum' of law. That is to say, a continuous relation (of synoptic structure) of a legal case to the legal norm will create a procedural process. In Horváth's opinion, law as the most developed social procedure establishes the most advanced stage of procedures by establishing the most developed procedural institution.

Horváth's role lies in the fact that traditional German-Austrian ties of the 20th century Neo-Kantian Hungarian legal philosophical thoughts were 'tailored' by him through transferring Anglo-Saxon theories of jurisprudence and created new perspectives for further development in Hungarian legal theory. Regretfully, the Second World War and the following political changes forced him to emigrate in 1949 and there he did not have the opportunity to continue developing his theory.[10]

József Szabó[11] (1909-1992) was a prominent representative of the gifted and promising generation, who achieved brilliant careers during the Second World War, and who were involved in the intellectual and scientific renewal of the country after the war. After graduation he became acquainted with Barna Horváth, founder of school and an exceptional personality of Hungarian legal philosophy. Horváth's personality and his legal philosophical approach representing the influence of Anglo-Saxon jurisprudence and legal culture gave rise to Szabó's enthusiasm. It was the period in the Hungarian legal philosophical thinking when, besides the achievements of Austrian, German and French legal philosophy, those of English and American jurisprudence were also considered.

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[10] Horváth's works from the 50s and 60s: 'Between Legal Realism and Idealism', in *Northwestern University Law Review,* 48 (1954) 639-713; 'Rights of Man: Due Process of Law and Exces de Pouvoir', in: *The American Journal of Comparative Law,* 4 (1955) 539-573; 'Field Law and Law Field', in *Österreichische Zeitschrift für öffentliches Recht,* 8 (1957) 44-81; 'Moral, Recht und Politik', in: *Österreichische Zeitschrift für öffentliches Recht,* 14 (1963) 218-252; 'Comparative Conflicts Law and the Concept of Changing Law', in *The American Journal of Comparative Law,* 15 (1966-67) 136-158; 'Twilight of Government of Laws', in *Archiv für Rechts- und Sozialphilosophie,* 64 (1968) 1-26.

[11] Szabó's main works of jurisprudence: *A jog alapjai* [The foundations of law], Budapest, 1938; *A jogászi gondolkodás bölcselete* [Philosophy of lawyer's thinking], Szeged, 1941; 'Hol az igazság? A bírói lélektan problémái' [Where is the justice? Problems of judge's psychology], in *Társadalomtudomány*, 22, 1942, 1, 1-55; 'Wahrheit, Wert und Symbol im Rechte', in *Archiv für Rechts- und Sozialphilosophie,* 37, 1943, 101-121; 'Der Rechtsbegriff in einer neutralistischen Beleuchtung', in *Österreichische Zeitschrift für öffenliches Recht,* 1, 1948, 3, 291-331.

As a result of Barna Horváth's aim to establish a school, the 'school of Szeged' was founded, and it included, besides Szabó, István Bibó, who later abandoned legal philosophy, and also Tibor Vas, who became Marxist in the 1950s and renounced the mentality of the school. Szabó's legal philosophical thinking bears the strongest marks of the master's irradiant influence. He began to elaborate his independent legal philosophical doctrine in the late 1930s. He was also deeply involved in issues on constitutional and international laws.

In his writings on legal philosophy Szabó attempts to discredit the Neo-Kantian model by using the outcomes of criticism, according to David Hume, and the American legal realism. Szabó, in his works published in the early 1940s, attempted to create a 'neo-realistic' approach to the concept of law. Applying the method common in Anglo-Saxon professional literature, he modelled the essence of legal thinking with describing legal cases. With this kind of approach, he seemed to discover a number of similar features between English and Hungarian 'traditional' legal attitudes. Citing the ideas of Jerome Frank, Edward Robinson and Thurman Arnold, the most outstanding personalities of American legal realism, Szabó abandoned belief in legal security, which was, in his opinion, revived by a faulty logical philosophy of law. In his theory he also used Frank's doctrine of 'fact-sceptics' and 'rule-sceptics'. Szabó claimed that in law enforcement it is not merely the legal norms one is to consider when looking for justice, since the statement of facts is as important a precondition for a righteous judgement as the interpretation of the corresponding law. He believed that legal decisions are influenced by 'psychological circumstances'.

When reading Szabó's works, one can clearly perceive the ideas of American legal realism. At that time, in the early 1940s, this kind of theory was considered rather exceptional in the Hungarian literature of legal philosophy. The influence exerted by the classical representatives of legal realism is undeniable. When appreciating Szabó's work one can suggest that, in a similar way to the evaluation of Horváth's work, he also gave particular pragmatic explanations to the classical Neo-Kantian problems. Doing so, he created the possibility for a prolific interrelation of two legal cultures, and abolished the previous one-sided Austrian and German orientation in the Hungarian legal philosophical thinking. This is considered very important even if we sometimes come across rather eclectic explanations. Neither the master nor his student is an exception to this. Regretfully, however, Szabó was not able to work out further systematic explanations to his theory of legal philosophy called 'neo-realistic'.

During the after-war years he was involved in reorganising the legal faculty of the university in Szeged. After the 'decisive year' (1949) like the reputation of many of his contemporaries, his reputation was also ruined. After his long imprisonment, with a short interruption after the revolution in 1956, Szabó lived in intellectual exile for a number of decades. Some of his papers and reviews were published only abroad. Only the last years of his life, after his restitution, brought him the opportunity to be involved in the professional public life of the country for a brief period.

A key precondition for us for being included in the European scientific life again is to know our traditions in legal philosophy and to apply all the research finds that our predeccessors have accumulated. However, we also have to be careful about fragmented oeuvres and they are to be compared to the scientific level of the concerned period. If we realise that there is a lack of original ideas and the theories

only belong to the second line, we have to express this. On the other hand, however, we should be proud of what is valuable even today.

Finally, we must clarify that, from the end of the last century, Hungarian legal philosophical thinking have supported the bourgeois transformation and the establishment of a modern civil society, according to the demand for modernisation of the society. Ágost Pulszky, Gyula Pikler, Bódog Somló, Barna Horváth, József Szabó and their students have become fighting representatives of Hungarian progress and they visioned a modern 20th-century Hungary. In this ambition a great role can be attributed to the 'empirical state', which is the driving force of modernisation, to the realisation of what kind of development can satisfy the needs of society, to 'correct law' required for achieving the goals, to the investigation of the nature of law supporting the regime, and also to the comparison of empirical reality and the related norms, and to everything that can provide the widest scope of freedom in the Kantian view. This list could be continued but even so we might perceive what kind of ambition our predeccessors had taken upon themselves. Although they could not provide a safe recipe but they have established the starting-points for us, since even today we often face the same problems and we do not have divergent goals, though we tend to achieve them by drawing on different paradigms.

■ Attila Badó*

Reforming the Hungarian lay justice system

In Hungary, like almost anywhere in the world, lay justice is a constantly recurring topic in the reflections on the judiciary. Since some regard administering justice as a profession, there has been a continuous discussion whether lay participation is needed in addition to or instead of professional courts. The present study does not aim at taking part in the academic debate on the necessity of lay participation. One of the reasons for this is that, in our view, no legal institution can be judged taken out from the particular historical context, legal system or structure of jurisdiction. For instance, it might prove to be difficult to argue against the jury if it plays an important political role in the independence movement of a nation and defies the repressive power through its verdicts. However, it might prove to be difficult to argue for the jury if it functions primarily as a means of repressing ethnic minorities in a certain era.

We will discuss a particular form of lay justice, which is present also in Hungary, by scrutinizing the dysfunction due to the peculiarities of the Hungarian society and jurisdiction. The reason for this investigation is that, in our opinion, in Hungary there is a large gap between the intention expressed by the law and the everyday practice concerning this institution, established in other countries as well. We would like to emphasize, however, that we would like to avoid any statements that could be interpreted as the general critique of this type of lay participation. We are convinced that under the same rules, but in a different social setting, and under different implementation of law, the same institution could very well function efficiently. We also claim that there is an urgent need for the reform of the Hungarian lay justice system.

* Szegedi Tudományegyetem , ÁJK Jogbölcseleti és Jogszociológiai Tanszék (University of Szeged, Department of Philosophy and Sociology of Law) Address: 6726 Szeged, Rákóczi tér 1. E-mail: bado@juris.u-szeged.hu

1. Historical precedents

In Hungary, it was already in the 19th century that the juries were established and those debates took place which, with a certain of emphasis, enumerated the most common arguments for and against the necessity of the lay judges.

Those who know the history of Hungary will not find at all curious that at this time (and as it will be discussed later on, also at the beginning of the 1990s) it was the political role of the jury that became the focus of the contemporary discourse. Similarly to Tocquville's[1] or Justice Black's[2] arguments, the main reasons for supporting this institution were the following: first, the importance of creating a counter-balance to the ruling power; second, the popularization of the implementation of law.[3]

The system of juries was introduced temporarily during the 1848 Hungarian revolution against the Habsburg dynasty, and re-introduced after the fall of the revolution, following the forced compromise (1867) with the Austrians. (Although juries were introduced during the revolution concerning cases related to the press, they were quickly abolished in 1852, under the open Austrian dictatorship.) It is therefore not surprising that, similarly to American settlers in former times, the jury could be regarded as a peculiar symbol also by the supporters of the independence of Hungary. Furthermore, at the time when the development of the bourgeoisie, though with a certain delay, finally started and the bourgeoisie wanted to participate more actively in the administration of public affairs, the jury could prove to be an excellent place for achieving this objective.

The ephemeral jury system in Hungary was based on the French jury system imported through the Germans. The similarity is demonstrated mostly by the composition of the jury and the selection of jurors. The jury consisted of three professional judges and 12 jurors, but after the random selection of jurors the prosecution and the defense could drop out disfavored persons in equal numbers. It was the population on which the selection was based that differed from the contemporary French system, as the number of those who could be selected for jury service was more restricted than it was in the contemporary France.[4]

2. Lay judges during the period of the one-party system

The Hungarian jury system was swept away by the First World War, as after World War I it did not serve the interests of the Horthy-regime to have a court which could be the source of conflicts, since this court might even disregard the laws if something offended against its sense of justice.

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[1] *Alexis de Tocqueville: A demokrácia Amerikában. (Democracy in America) Gondolat Kiadó, Budapest, 1983.*

[2] *Justice Black in his dissenting opinion in Green v.U.S., 356 U.S. 165., 215-216. 1958.*

[3] *Bónis- Degré- Varga: A magyar bírósági szervezet és perjog 2. Bővített kiadás. A kiegészítő jegyzeteket írta: Dr. Béli Gábor. Zalaegerszeg 1996*

[4] *Badó Attila: A francia esküdtszékkel kapcsolatos dilemmák In: Acta Juridica et Politica, Szeged, 1999*

After the Second World War, however, lay judges began to play an important role again. The transformation of the Hungarian judiciary started even before the communist takeover, and had as a consequence that this field, which was earlier relatively depoliticized, became an ideological battleground and, with respect to jurisdiction, the participation of people's representatives as lay judges was considered by the Communist Party as one of the most efficient weapons in the ideological struggle. After the war, lay participation was realized, on the one hand, in the People's Tribunals, established for the investigation of war crimes, and on the other hand, in the traditional courts in the frame of a lay assessor system.

2.1 People's Tribunals

The people's tribunals and their institution for appeal, the National Council of People's Tribunals, were set up on 25 January, 1945, before the end of the war by the Provisional Government. Hungary was obliged by the Truce of Moscow to establish people's tribunals and this obligation was reinforced by the Treaty of Paris, which ended World War II. People's tribunals were organized at the seats of law-courts. The leaders of the councils were appointed by the Minister of Justice from among practicing lawyers and the six lay assessors were proposed by the five parties composing the so-called Independence Front and by the trade unions. The judges of the people's tribunals had a three-month-long mandate, which was renewable. The first judgments were passed without legal authority. Later on, the authority of the people's tribunals was extended to cases concerning the threat to peace. The new institution was intended to be a provisional one, and according to the first act on people's tribunals, these courts would operate only until the restoration of the juries. The operation of the people's tribunals marked the beginning of making mockery of justice.[5] The sheer fact that in this period the people's tribunals had to deal with an incredible number of cases compared with similar courts established in other countries, revealed that besides punishing the war

[5] *Before the people's tribunal, the prosecution was represented by the people's prosecutor nominated by the Minister of Justice. These were in many cases non-qualified lawyers who made serious mistakes concerning both the classification and the evidences. Their rhetoric was based on the pretentious slogans of the contemporary press. The strong position of the prosecution against the defense was striking. The words of the intimidated or party-loyal counsels resembled rather the speech of the prosecution than the speech of the defense. When the counsels represented too strongly the interests of the defendant, they were either reprimanded by the prosecutor or the judge or deprived of the right to represent the defense. Even the question whether the defendant had the right to choose his/her counsel was a matter for debate. The Bar of Budapest, on the pretext of conforming to public opinion, decided that the defense of war criminals was to be represented only by an appointed counsel. At the time when one could choose one's counsel there were still courageous counsels for the defense. However, after the introduction of the system of appointed counsels it became possible to select the counsels on a political basis. The president of the people's tribunal, who initially did not have the right to vote, was basically responsible for the instruction of laypersons and for the leading of the court hearing. However, the president had a large influence on the outcome of the cases. It was him who informed the lay judges about the law as it applied to the case, and about the possible sanctions. Consequently, it was not irrelevant for the Communist Party who held this position.*

criminals these institutions served other objectives as well, namely the enforcement of party interests and the removal of political opponents. [6] On the pretext of the punishment of war criminals which was required by the Western powers, the Communist Party led by Rákosi Mátyás began the elimination of the other parties with the help of these tribunals. All of a sudden more and more seditious elements were discovered among the members of the victorious political parties through the proceedings of people's tribunals, mostly on the basis of false accusations. As a consequence, the members of the democratic parties either joined the Communist Party or left the political scene in order to avoid retaliation. Looking back it is quite difficult to understand how Rákosi and his party managed to control the institution of people's tribunals to such an extent, while the people's judges were delegated by five parties. This can be partially explained by the fact that the Communist Party aided by the Soviets had filled the positions of council's leaders and those of people's prosecutors by their party members before the democratic parties could react. Furthermore, the communists got some of their party members to join various democratic parties and asked them to weaken these parties from inside. Finally, they had control over a considerable number of judges, who were intimidated by the threat that their past would be revealed. Such illegal practices were either planned by the communists led by Rákosi or executed under the explicit orders of the soviet leadership. The proceedings of people's tribunals therefore disregarded the proclaimed ideological objectives and instead of fascists it was often the members of the victorious democratic parties who were accused. After 1949 the people's tribunals began to lose their importance, since their role was taken on by traditional courts. It was only after the 1956 revolution that they became significant political means again, when the conviction of revolutionaries had to be hidden behind the mask of "the people" to legitimize the regime. [7]

2.2 The lay assessor system

In the course of 1948-1949 a turning-point came about when the communist takeover of the power inaugurated the era of a governing system based on the Soviet example. At this time the new system required more definitely the reorganization of jurisdiction, and this marked the beginning of the epoch of socialist legislation. The process of legislation started with the reform of substantive and procedural law on the basis of the Soviet example. The modern codes having come into existence under the Austro-Hungarian regime were gradually replaced. We can also observe the commencement of the disintegration of the highly complex four-level jurisdiction system with the objective that a new jurisdiction system be created in accordance with the party organization and the administrative system. Act XI. of 1949, which limited the possibilities of appeal in the case of criminal proceedings, also ruled on the initiation

[6] *Between 1945 and 1950, about 10000 people were accused in Austria, 17000 in Belgium, less than 20000 in Czechoslovakia, and almost 70000 in Hungary*

[7] *FLECK Zoltán: Jog a diktatúrában. Jogszolgáltató mechanizmusok a totális és poszt-totális politikai rendszerekben. Budapest, 1999. Doktori Disszertáció; RÉV István: A koncepciós színjáték. Rubicon, 1993/3.*

of the lay assessor system, the authority of which was extended to other fields of law later on. This meant that the professional judges formed judicial councils together with the so-called lay assessors on various levels of the court system, in a way that the judges had equal rights within the council generally composed of one professional judge and two lay assessors.[8]

This system was practically the adaptation of mixed tribunals, present in Germany and other European countries, to the Hungarian legal system. It is interesting to note that this frequently criticized institution proved to be more persistent than anyone would have expected, given the fact that it is still in existence substantially in the same form. According the first act on lay assessors, this form of administration of justice was initiated on the one hand to ensure that the opinion, the sound view of life, and the natural sense of justice of the working people play a role during court hearings and in the passing of judgments, and on the other hand to make possible the democratic control of the judge. Taking into consideration the particular political context, it is not difficult to realize the objective of the latter function of people's tribunals. The aim was by no means to supervise the impartiality or the incorruptibility of the judge, but to have control over the judges socialized in the former system. After the communist takeover of the power the judges appointed under the former regime were progressively intimidated and removed. This could happen by assigning lay judges efficiently trained by the party leadership, who were to work with the professional judge, and had to report on his activity and obstruct his work. This was made possible by the new law which from the very beginning gave equal rights to the lay assessor and the professional judge. That is to say, if the law ordained the participation of the lay assessor, professional judges and lay assessors had to administer justice strictly together in every phase of the procedure from the determination of issues of fact and law to the passing of the judgment.

After the Stalinist era, however, this institution gradually lost its political significance, and the dominance of professional judges became more and more manifest. In other words, from the 1960s, the stabilization of the communist regime and the considerable changes in the composition of the judicial society made it unnecessary to use lay judges for political reasons. With the emergence of loyal judges with a more and more technocratic view, the lay persons lost their importance.

Previous research from the perspective of the sociology of law carried out by Kulcsár Kálmán[9] at the beginning of the 1970s already demonstrated this trend. The results of these studies show that the participation of lay assessors is quite low, their contribution to the making of the judgment is exceptional. Although numerous reasons of this dysfunction were revealed by the researchers, the most important one proved to be the selective process, which made it possible that usually elderly, retired people be "selected", who would not "disturb" the work of the professional judge.

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[8] *ZINNER Tibor: Háborús bűnösök, népbíróságok. História, 1982: IV. évf.. 2. sz.*

[9] *Kulcsár Kálmán: A népi ülnök a bíróságon. (Lay assessors in court) Akadémiai Kiadó, Budapest 1971.*

3. Lay assessor system after the change of the political system

It becomes obvious from the above discussion that in Hungary lay participation cannot be regarded as a great success of the 20th century. What is most surprising is the fact that while most institutions discredited in a similar way were abolished or transformed, the lay assessor system is still in existence although it is widely known that this system does not work properly and that the recrutation of the necessary number of lay assessors causes constant problem.

Almost immediately after the free elections in 1990, there is a demand for the reform of the lay justice system, the main objective of which was the introduction of the jury in Hungary[10]. After the dictatorship, this demand seemed to be logical for many people, and they argued by underlining only the political advantages which were proclaimed by authors from Lord Devlin[11] to the ones quoted above. The legitimacy of jurisdiction should be reinforced by increasing the role of voters in the same way as the election of members of Parliament creates the legitimacy of legislation directly, and that of the executive power indirectly. The political advantages alone could not convince those who had ambivalent feelings towards the jury in terms of competence. This is the reason why the proposals on the introduction of the jury were removed from the agenda in spite of historical traditions.

However, the arguments managed to weaken or wipe out those efforts which would have set out the future of Hungarian judiciary in the opposite direction by intending to eliminate the role of lay persons.

Finally, due to the practical problems of the selection of lay assessors, the lay assessor system was modified only to the extent that the number of cases requiring the participation of lay judges was limited and that the term "people' assessor"[12], typical for the socialist era, was replaced by the term "assessor"[13]. However, this institution remained pseudo-democratic and practically unnecessary in its present form.

3.1 Rules presently in force

One of the greatest attempts at the reform of the Hungarian judiciary was made in 1997. The alterations affect principally the court organization and the external administration of courts. (The court system became more complex and the role of the Ministry of Justice was taken over by the National Council of Jurisdiction, which is composed mostly of judges.) The reform also contained changes concerning the lay assessor system. (We claim, however, that the reform was not far-reaching enough to solve this problem of the Hungarian jurisdiction.)

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[10] *Botos Gábor: Az esküdtbíróság újbóli bevezetéséről. In: Rendészeti Szemle. A Belügyminisztérium folyóirata.2/ 1992 11.-51.*

[11] *Devlin, P.: Trial by jury. Stevens and Sons, 1956:164.*

[12] *Népi ülnök*

[13] *Ülnök*

According to the new law, the assessors work together with judges in administering justice. They obtain this position by election, based on the principle of people's sovereignty. The lower age limit to be able to become an assessor is raised from 24 to 30. This alteration is parallel with the rise in the lower age limit of becoming a judge. The selection of the assessors follows principally the former regulation. The assessors are nominated by Hungarian citizens having domicile under the jurisdiction of the court and a right to vote, by the local governments under the jurisdiction of the court and by non-governmental organizations with the exception of political parties. Depending on the level of the court which assessors will be assigned to, they are selected by various bodies of local governments. The law did not change the four-year-long mandate of the assessors. The preparation of the selection and the decision how many assessors should be selected for particular courts belong to the authority of the National Council of Judiciary. The date of the election is set by the President of the Republic. The assessors are assigned to the particular judicial councils by the president of the court. In contrast to the former regulation the new law provides in details on when and how the term of office of the assessors expires. The assessor is allowed to hold this position until the age of 70. In the judicature the assessors still have the same rights as the professional judges.[14] Furthermore, there is a raise in the inadequately low remuneration, which is thereby adjusted to the responsibility characteristic for the position of a judge.[15]

3.2 Reality and reform

As a result of the modification some positive alterations can be observed. (The upper age limit of 70, for instance, excludes the possibility that really old people incapable of following the events of a court hearing become lay assessors.) However, there is still a large gap between the pretentious rules and the reality. In our opinion, the new rules did not change essentially this institution, which thus remained dysfunctional.

Yet, we are convinced that, taking into consideration the rules of Hungarian procedural law, mixed judicature in the proper sense of the word is needed on every level of the court system. One should not be a partisan of legal realism to be aware of the risk of letting a single judge reach decisions which have a large influence on the lives of citizens, as such decisions depend highly on the actual state of mind and powers of concentration of a single person. Without the intention to take part in the debates on the necessity of lay participation, we claim that due to budgetary limits and the Hungarian court system this problem can be solved only by promoting lay participation in today's Hungary.

The above-mentioned problem manifests itself mostly in the so-called local courts representing the lowest level of the judicial hierarchy. These courts have to deal with the majority of the cases. However, it is exactly in these courts that in many cases

[14] *However, the equal rights are not parallel with equal obligations. The assessor is allowed to be the member of a party, which is also reinforced by a decision of the Constitutional Court: (51/1992. (X.22)*

[15] *Act LXVII of 1997, §122-128*

young (30-40-year-old) and inexperienced judges pass judgments alone[16], and in more serious cases together with two lay assessors.

Furthermore, they have to deal with hundreds of cases at the same time without an adequate number of administrative assistants. Nevertheless, concerning criminal proceedings the Hungarian procedural law gives especially great power - particularly with respect to the consideration of evidences - to the judges in the courts of the first instance. (The part of their judgment related to the consideration of evidences cannot be changed in principle by the appeal court.) In such a situation it would be of paramount importance that the professional judge would not have to bear the full weight of responsibility and to decide alone on people's future. At present, lay persons are not ready to assume a role with such high responsibility. Despite the legislators' intention for them to have such a role it is obstructed by the selection process, by the survival of lay judges' behavior developed in the socialist era, and by the prejudices of the professional judges etc. As we have already mentioned, it would be possible according to law that the lay persons outnumbering the professional judges reach a decision opposed to that of the professional judge. However, there are hardly any examples in the judicial practice of the past few decades where the professional judge, disagreeing with the judgment, expressed his dissenting opinion attached to the court's decision.[17] Yet, according to the judges the lay persons might make useful remarks especially if they have better knowledge of an issue than the professional judge owing to their profession. The results of our previous study[18] show that the judges do not consider the lay persons as equal partners, they are not involved in the passing of decisions, which is not expected by the majority of assessors either. Even those assessors who initially are active to a certain extent shortly take on a passive role, adapting themselves to the traditions, and become mere observers of the events. Taking all this into consideration it is not surprising that assessors are often mockingly called 'ornaments' by the lawyers. This ironic attitude was also reinforced by the amendment of the existing law in 1995. The situation of the assessors is best characterized by the fact that their replacement has no consequence in terms of procedural law. That is to say, assessors can be changed freely during the procedure. Should the date of the court hearing not be suitable for one of the assessors, s/he can be replaced by the judge in charge of the assignment of the assessors. Knowing what happens in practice we can point out that the present form of the lay assessor system is nothing but the caricature of people's participation. This is why we find that a comprehensive reform in this respect cannot be further postponed in order to give sense to the already existing institution by acknowledging the necessity of mixed tribunals.

In our view the problem could be solved by making the assessors' service civic duty[19], by elaborating carefully the selective mechanism, and by ensuring an appropriate remuneration for the assessors. We are convinced that in order to achieve

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[16] *In criminal proceedings in case of crimes which can be sanctioned by not more than three years of imprisonment*

[17] Az ítélkezők felelőssége — Magyar Nemzet 1999. március 24. 7.p

[18] *BADÓ Attila & NAGY Zsolt: Az ülnök szerepe a bíróságon. (The role of assessors in court). Manuscript.*

[19] *Or at least it should become an activity giving such an amount of social esteem that it would become really possible to choose from the applicants*

the above-mentioned objectives the Hungarian lay assessor system should adopt of solutions used in juries and lay assessor systems in other countries.

At present those become lay assessors who would like to. This intention is usually fueled not by an insatiable desire for participating in the administration of justice but rather by the modest remuneration or by the 'appetitus societatis'. It was demonstrated by the last few assessors' selections that there are much fewer candidates for this position than it would have been necessary. [20]Even today, the overwhelming majority of the candidates are senior citizens, who represent a particular segment of society. It might sound strange considering the efforts made by other countries, and especially by the United States to enforce the 'fair cross-section requirement' and the constitutional requirement of impartiality. Although the theoretical and practical problems of the selective mechanism are known[21], it is evident that experiences from America, from France and other countries could prove to be useful. It is unacceptable that with the exception of the judge responsible for the assignment of the assessors, no one else has the right guaranteed by procedural law to make objections to the choice of the assessors. We do not intend to give work for the sociologists and psychologists[22], but we think that the "voir dire" procedure could be applied with certain restrictions in the case of assessors.

Other patterns related to the passing of judgments ensuring the responsibility and the real participation of lay persons could also be applied. For instance, secret voting on certain issues, on guilt, and on the sanctions could be made mandatory. We are convinced that through such modifications carried out following the suggestions of experts the present situation could be altered in a way that the positive effects should be felt by the professional judges as well.

In the present paper, we do not aim at giving effective suggestions concerning the reform. Our only objective was to draw attention to intolerable situation of Hungarian lay assessor system, which can discredit lay justice and which calls for an urgent solution. In order to be able to make effective suggestions, in addition to studies from the perspective of the sociology of law, there is a need to reveal and solve practical problems, which should be based on active cooperation of experts representing various fields of law. We hope that we should not wait long until the beginning of such cooperation.

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[20] Lassan befejeződik a laikus bírák választása Népszava 1997. október 30. 6. p

[21] *Mitchell S. Zuklie (1996) Rethinking the Fair Cross-Section Requirement, California Law Revies Vol. 84:101*

[22] *Sage, Wayne (1973): Psychology and the Angela Davis Jury. Human Behavior Magazine, January, 56-61.Murray SAMS, Jr. (1969) „Persuasion in the Voir Dire: The Plaintiff's Approach," in Persuasion: The key to damages 3-8 G. Holmes ed.*

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